”VAT carrousels” and commercial money laundering, etc.

Second edition

by

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PREFACE

In this second edition of *"VAT carrousels" and commercial money laundering, etc.*, I have made an update of that subject, which is rather dynamic due to occurring frauds often denoted as carrousel trading, where the fraudsters use more than one Member State of the European Union (EU) to appropriate money from their tax authorities to the detriment of the national budgets of those countries. I am addressing this problem from a Swedish horizon, where I analyse Swedish law concerning the subject in relation to the EU law. Concerning VAT frauds of a so-called carrousel type, I use the expression 'VAT carrousels'. It is my translation of the Danish expression *momskarruseller* but means the same as for instance VAT fraud, which is my translation of an alternative Danish expression, *momssvig*. In this book, I make some comparisons with the other two Nordic Member States, that is Denmark and Finland. Since Finland has both Finnish (suomi) and Swedish as its official languages and Finnish is not a Scandinavian language, I chose already in the first edition of this book to use the expression 'VAT carrousels' in its title and for the rest of my presentation of the subject.

Sweden as an EU Member State has only conferred competence to the EU and its institutions in certain fields, like with the VAT (value-added tax) law, where harmonisation of the Member States' national legislations in the field is demanded according to the EU's primary law. It is fundamental for the internal market that competition and consumption distortions are avoided concerning indirect taxes like the VAT and therefore the principle of a neutral VAT is expressed by the EU in the secondary law as well as in the primary. However, the Swedish parliament has not conferred the competence concerning criminal law to the EU. The criminal law is an example of a field where in principle an exclusive national competence prevails also after Sweden's EU-accession in 1995. Thus, the issue of making the VAT law and the criminal law in Sweden working together with regard to both legal certainty for the individual and the State's interest of VAT collection is the main thread in this book.

I begin the book by summarizing what I am writing about in the articles constituting the chapters and annexes of this book and I also give an overview of examples of questions that can be raised set out from these. Thereby, I suggest some questions that can be raised at lectures or seminars about in the first place 'VAT carrousels' and commercial money laundering. In the following chapters and annexes, I make a review of my series of articles on that subject, which originally have been published in Swedish in periodicals in Sweden and Finland mainly during the period of 2021–2025. In this book, I present the articles translated by me into English. I end the book with conclusions on some legal certainty issues in the context, which could be raised by the Swedish legislator or by researchers anywhere.

This book is intended to be a support at lectures and seminars or research efforts on the subject in question. It is also intended to be used by practicians within the fields of VAT law and criminal law. For lecturers and students and for practicians too, I aim for the book to function as a guidance, where questions about the phenomenon VAT frauds of a carrousel type and connections in that respect to commercial money laundering are concerned. With regard to practicians working with such matters, the book is intended to function as a tool to identify legal certainty issues in proceedings on value-added taxation as well as regarding connecting criminal cases.

Stockholm in September 2025
Björn Forssén

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ABBREVIATIONS ETC.

ADP, Automatic Data Processing
AI, artificial intelligence
Artiklar, articles
B, (in case no.) criminal case
Balans, *Tidningen Balans fördjupning* (The Periodical Balans: Advanced articles)
BEPS, base erosion and profit shifting
BFL, *bokföringslagen (1999:1078)*, the [Swedish] Book-keeping Act
BFN, *bokföringsnämnden*, the [Swedish] Accounting Standards Board
BrB, *brottsbalken (1962:700)*, the [Swedish] Penal Code
BrP, *lag (1964:163) om införande av brottsbalken*, the [Swedish] 1964 Act on introduction of the Penal Code
Böcker, books
C, *curia* (about the CJEU)
CCBE, The Council of Bars and Law Societies of Europe
Ch., chapter
Cit., citaton or cited
CJEU, Court of Justice of the EU
COM, the EU Commission
cp., compare
Dan., Danish
DJ, *Dagens Juridik* (Today's Law)
DML, *momsloven*, the Danish VAT Act
dnr, day-book number
EBM, *Ekobrottsmyndigheten*, the [Swedish] Economic Crime Authority
EC, European Community
ECHR, European Convention of Human Rights
ECLI, European Case Law Identifier
ECtHR, European Court of Human Rights
EEA, European Economic Area
EEC, European Economic Community
e.g., exempli gratia, for example
Eng., English
EPPO, European Public Prosecutor's Office
et al., et alii, and others
etc., etcetera
EU, the European Union or the Union
FAR, *Föreningen Auktoriserade Revisorer* (the Institute for the Accountancy Profession) in Sweden
FML, *mervärdesskattelagen (1501/1993)*, the Finnish VAT act
Forskning, research
FPL, *Förvaltningsprocesslagen (1971:291)*, the [Swedish] Administration Procedural 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
GTL, *tullagen (2000:1281)*, the [Swedish] Customs Act, replaced on 1 May, 2016 by the TL
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

Implementing Regulation, the COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011 on implementing measures for the VAT Directive
IUA, intra-Union acquisition (formerly intra-Community acquisitions)
JFT, *Tidskrift utgiven av Juridiska Föreningen i Finland* (The journal published by the Law Society of Finland)
KFM, *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
PAL, *produktansvarslagen (1992:18)*, the [Swedish] Product Liability Act
para, paragraph
PFS, *Pedagogiskt Forum Skatt*, Pedagogical Forum Tax (see www.forssen.com).
PIF Directive, Protection of the Union's Financial Interests
PMT, the special scheme of profit margin taxation (Sw., *Vinstmarginalbeskattning*)
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
RSV, *Riksskatteverket*, the [Swedish] National Tax Board (nowadays the SKV)
RÅ, *Regeringsrättens årsbok* (nowadays HFD), the HFD's yearbook
s., *sida*, page
SBL*, skattebrottslagen (1971:69)*, the [Swedish] Tax Fraud Act
sec., section
sen., sentence
SEK, Swedish crowns
SFL, *skatteförfarandelagen (2011:1244)*, the [Swedish] Taxation Procedure Act
SFS, *svensk författningssamling*, Swedish Code of Statutes
Sixth VAT Directive, the EC's Sixth VAT Directive (77/388/EEC)
SKV, *Skatteverket*, the [Swedish] tax authority
SOU, *statens offentliga utredningar*, the [Swedish] Government's official reports
SRN, *skatterättsnämnden*, the [Swedish] Board of Advance Tax Rulings
SST, *Svensk Skattetidning* (Swedish Tax Journal)
SVT, *Sveriges television*, Swedish television
Sw., Swedish
TEU, Treaty of European Union
TFEU, the Treaty on the Functioning of the European Union
TL, *tullagen (2016:253)*, the [Swedish] Customs Act
U, *uttalande*, statement
UN, the United Nations
VAT, value-added tax
VAT Directive, the EU's VAT Directive (2006/112/EC)
VoIP, Voice over Internet Protocol
VRGA, *Vägledande regler om god advokatsed*, Guiding principles of professional conduct for lawyers
www, world wide web
ÅRL, *årsredovisningslagen (1995:1554)*, the [Swedish] Annual Accounts Act

INTRODUCTION

Outline of this book

I express the issues of this book in chapters I.–VIII. and thereto following annexes 1–5. These are articles of mine and all originally in Swedish, which I have translated into English. In a final chapter, I give some concluding legal certainty aspects in relation to those.

I have kept the order of chapters I.–VI. and annexes 1–5 from the first edition of this book and added in this second edition chapters VII. and VIII. and the final chapter. Below in this section, I mention all chapters and annexes and how these relate to each other making this book. Especially concerning *ANNEX 4*, I may mention that the excerpt from my book *Indirect taxes – A Swedish experience of the research on the EU law* (from 2024) is replaced in this edition with the complete referred article, which I am citing Forssén 2018b. Under the next headline, I give an overview of examples of questions that can be raised set out from the issues brought up in the chapters and annexes of this book.

I raise the matter of the rule of law concerning one of its core principles in all EU Member States according to the EU Commission, namely legal certainty, where I reason about the VAT law and criminal law in Sweden and legal certainty for the individual as well as the State's interest of VAT collection. This is the main thread in this book, and the central issue concerns the phenomenon of what I call 'VAT carrousels', which follows by the book-title.

In Chapter I., I express the article by which I start my review of the issue on 'VAT carrousels', *Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704* (VAT frauds of so-called carrousel type and NJA 2018 p. 704). Therein, I reason about this issue 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 – i.e. a 'VAT carrousel' – regarding accounting of value-added tax (VAT), and then focus on the matter of tax fraud (Sw., *skattebrott*) in a case of abusive practice (Sw., *förfarandemissbruk*).

- In *ANNEX 1* is to be found my article containing inter alia my comment to a commentary of my article according to Chapter I.

In Chapter II., I express the article *Skenfaktura med momsdebitering – konsekvenser för skatt och redovisning* (Fictitious invoice with charging of VAT – consequences for tax and accounting), where I account for the consequences for an issuer and a receiver of a fictitious invoice with charging of VAT, i.e. "false VAT". Therein, I state inter alia that in a case of VAT fraud by carrousel trading, i.e. by a 'VAT carrousel', 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 *Skatteverket*, the tax authority, 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 *ANNEX 2*, I continue on the theme in my article according to Chapter II. by connecting 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 my article from 2021, where I emphasize the importance of an efficient registration control by the SKV to counteract all sorts of VAT fraud. Although I started the project leading to the present series of articles in 2022 by the article in Chapter I., I mention it as included in my present series of articles during the period of 2021–2025, i.e. also concerning the problems regarding 'VAT carrousels'.

In Chapter III., I express the article *Näringspenningtvätt i momskarusell* (Commercial money laundering in VAT carrousel), where I repeat from Chapter I. 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.

In the last-mentioned respect, I added 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 Chapter IV., I express the 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), where 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 Chapter V., I express the 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), where I state that such a lowering of the taxable amount for VAT which 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. However, I make a reservation that abusive practice might be considered existing if the same goods are repeatedly comprised by measures using those special rules.

- In *ANNEX 4* is to be found an article where I mention another law technical problem, namely a gap in the Customs Act that can cause a far too vast scope of the right of deduction for input tax, and I describe a thereof following risk for undesired arrangements.

In *ANNEX 5* is to be found an article where I bring up the question of the existence for VAT purposes of a special intermediation rule which I call a 'VAT commission rule'. Ever since the VAT was introduced in Sweden in 1969, the SKV has often asserted there is such a special rule meaning that although an agreement on commission trading would not exist between a middleman and his mandator the rule is expanding what is meant with commissioner for VAT purposes to comprise not only commissioners in an ordinary sense, but also representatives *comparable* with those. I question that the special 'VAT commission rule' existed at all before the introduction on 1 July, 2023 of the new Swedish VAT and let

alone that it would exist thereafter – contrary to what the SKV seems to claim in an addition to its standpoint on the matter.

Since the first edition, I have – as mentioned – added some chapters to this second edition. In the last-mentioned respect, I have added Chapter VII., where I express my article *Mellanmän och frågor om karusellhandel respektive vinstmarginalbeskattning – en jämförelse av gamla och nya mervärdesskattelagen i Sverige* (Middlemen and questions about carrousel trading and profit margin taxation – a comparison of the old end the new VAT act in Sweden). Therein, I make a deepened analysis of the issue of the existence previously or nowadays of a special 'VAT commission rule' in the SKV's meaning and of its consequences for the individual and also for the State.

The investigation about measures to prevent VAT frauds has submitted its partly report SOU 2023:49 and its final report SOU 2024:32 to the government, where the problems with 'VAT carrousels' are mentioned. In Chapter VIII., I express the article *Frågor med anledning av slutbetänkandet Åtgärder mot mervärdesskattebedrägerier* (Questions on account of the final report Measures against VAT frauds), which I also has added to this second edition of the book. Therein, I bring up precisely the investigation SOU 2024:32 and questions which I consider remain also after that final report. By the way, the final report SOU 2024:32 did not lead to the supposed legislation on 1 July, 2025.

- Already in Chapter VI. (from the first edition), I express the article *Aktuell utredning löser inte problemet med momsbedrägerier* (Current official report does not solve the problem with VAT frauds), where I comment the partly report SOU 2023:49.

In the final chapter of this book, CONCLUSIONS – SOME LEGAL CERTAINTY ASPECTS, I give some concluding aspects on the previous chapters and annexes with the focus set first on the topic of legal certainty and also make procedural remarks in that respect.

Examples of questions that can be raised at lectures or seminars on the subject of this book set out from the chapters and annexes 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 VAT fraud by carrousel trading, i.e. by a 'VAT carrousel'? 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*") with regard to tax fraud? See Chapter II. and *ANNEX 2*.
- 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.
- If it is not already shown by that presentation, mention something about the principle *ne bis in idem* (not twice about the same cause) and erroneous information concerning the rules on tax surcharge and tax fraud (see Chapter VI., section 4). In that respect, also mention something about the demand on double criminality and the risk prerequisite for tax fraud in Sweden (see Chapter VI., section 7).

- Discuss whether a more efficient registration control by the tax authority regarding VAT may decrease the problems with 'VAT carrousels'. See *ANNEX 3*.

- 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. 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 Swedish parallel current law in relation to the EU law. In that respect, see also below about the demand on leave to appeal in the highest instances of the Swedish judiciary system, which I bring up in the final chapter.

- In Chapter VII., concerning the question from *ANNEX 5* about the existence of a special 'VAT commission rule', I make – as above-mentioned – a deepened analysis of that issue. Thereby, I reason about the SKV's – and the EBM's – investigations of matters on carrousel trading concerning whether the special rule means that the middleman's taxable amount consists of both the value of hardware and software regarding trade of electronical products, e.g. computers or mobile phones. Contemplate whether it conflicts with the EU law about VAT that the middleman would be value-added taxed also for big international enterprises' – the mandators' – operating systems in for instance a sold mobile phone, i.e. for the software too, and not only for the hardware, i.e. just for the phone delivered to the customer.

- In Chapter VIII., I bring up some questions which I consider remain after *The investigation about measures to prevent VAT frauds* and its final report SOU 2024:32, namely inter alia legal certainty in the present context regarding matters and proceedings on 'VAT carrousels'. The investigation suggested measures against 'VAT carrousels' and was supposed to lead to legislation on 1 July, 2025 but this has not been the case. Therefore, I suggest, as a topic for lectures and seminars on the subject of 'VAT carrousels', reasoning about legal certainty especially concerning matters where questions of tax fraud and commercial money laundering are combined in the proceedings. Discuss for instance the following questions.

  Would it have caused problems for the judgment of VAT frauds by e.g. 'VAT carrousels' if the investigation's suggestion to revoke the exemption from tax fraud for verbal information had been realized? See chapters VI. and VIII.

  May Sweden's participation in the European Public Prosecutor's Office (EPPO) since 1 October, 2024 be likely leading to decreased problems with 'VAT carrousels'? See Chapter VI., section 7.

- In the final chapter of this book, I give some concluding legal certainty aspects in relation to the other chapters and annexes. This especially with regard to the VAT reform of 2023, why I suggest discussions about the need of precedents in the highest instances concerning both VAT law and criminal law about the matter on the existence of a special 'VAT commission rule' in Sweden. Thus, I raise as a matter of legal certainty the question whether the demand on leave to appeal in the highest instances of the Swedish judiciary system might entail the emergence of an actual current law which conflicts with the EU law in the field of VAT.

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 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

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[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) – abbreviated SST, SST 2022 pp. 118–130 (Forssén 2022a).

[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 and Karina Skovgaard Svane, where the following is stated in section 2.7 ("*Hvordan opbygges en*

has reverse charge been introduced in the GML for 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 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 *skattebrottslagen (1971:69)*, the Tax Fraud Act, 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.

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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). I note that since 2015, VoIP is mentioned in Article 6a(1)(b) of the COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011 (the so-called Implementing Regulation) as an example of telecommunications services according to Article 24(2) of the EU's VAT Directive (2006/112/EC) – the so-called VAT Directive. The VAT Directive replaced on 1 January, 2007 the EC's First VAT Directive (67/227/EEC) and the EC's Sixth VAT Directive (77/388/EEC).

[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). The lecture memo is available on my website, https://www.forssen.com/forskning/f13/.

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 too 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 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 Joined 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 Joined 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.

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

[12] ECLI:EU:C:2006:446.

[13] ECLI:EU:C:2006:16.

Moreover, the Svea Court of appeal states that the Supreme Administrative Court (*Högsta förvaltningsdomstolen*, abbreviated HFD), after Joined Cases C-439/04 and C-440/04, has ”established” in the case HFD 2013 ref. 12 that it at application 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*. 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 and Recolta Recycling”-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. 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 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 Case C-255/02 (Halifax et al.),[14] where the CJEU inter alia considers that if the transactions which are the basis of the right to make a deduction for input tax constitute abusive practice such a right does not exist according to the Sixth VAT Directive, nowadays the VAT Directive.[15] To conclude that abusive practice exits it is according to the CJEU required that the present transactions, despite being formally correct, cause that a tax advantage is achieved which conflicts with the purpose of the rules in the directive, and it shall also be evident by the objective circumstances that the main aim with the transactions is to achieve a tax advantage.[16] However, the senior judge of appeal stated inter alia *that the CJEU in C-255/02 Halifax et al. Expressed that the relationship that it is concluded that an abusive practice exists does not need to lead to any measure of sanction, which would demand a clear and unequivocal support in law, but instead reimbursement liability since the deduction has become unjustifiably (item 93)*. Moreover, the senior judge of appeal stated that the criminal law principle of legality according to Ch. 1 sec. 1 of the BrB functions as guarantee of legal certainty, by it raising a demand on the legislation meaning that it must be foreseeable for the individual, where 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 Joined Cases c-439/04 and C-440/04 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 an expansion of the criminal law responsibility without support in any decision of guidance, why it could questioned whether such an interpretation and

[14] ECLI:EU:C:2006:121.

[15] See item 85 of Case C-255/02.

[16] See item 86 of Case C-255/02.

application of a directive is complying with the criminal law principle of legality. Due to that uncertainty, the senior judge of appeal considered, unlike the majority in the Svea Court of appeal, that the defendant would be acquitted from responsibility.

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

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

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

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

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

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

I put the senior judge of appeal's perception that the defendant should have been acquitted with regard of the criminal law principle of legality in relation to the HD's remark that the

question of intent was not comprised by the leave to appeal. In my opinion, this means that, despite that the HD in NJA 2018 p. 704 confirmed the verdict of conviction by the majority of the Svea Court of appeal, it is not clear that abusive practice in itself means that criminal law responsibility exists. Furthermore, in the individual case it shall always be decided if also the risk prerequisite for tax fraud is fulfilled. I am reminding of this, since the HD did not treat the risk prerequisite within the frame of the given leave to appeal.

4 Concluding viewpoints

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

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

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

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 decides that such a meeting shall not be held, the prosecutor must state the reasons for the rejection. This means that the prosecutor must include those in the protocol of the preliminary investigation, if the prosecutor is aiming to go further and decide to prosecute. Then increases, in my opinion, the defence lawyer's possibilities to successfully bring up in the statement of fact in the district court that the court according to sec. 15 first para of the SBL should declare the criminal case resting while awaiting the outcome of the taxation question regarding the VAT, regardless of whether it concerns output or input tax.

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

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

To mention the relationship between making the tax control more difficult and book-keeping crime is in my opinion of interest especially when a tax case about VAT is based on or might be based on assertions from the SKV of abusive practice and that question can become mentioned in a tax fraud case which is essentially about the same circumstances as the tax case. If the prosecutor does not bring up either making the tax control more difficult or book-keeping crime, the prosecutor has solved a problem that arose in the criminal cases about tax by the reform of the SBL on 1 July, 1996, namely the competition of rules which thereby came up between sec. 10 of the SBL, making the tax control more difficult, and Ch. 11 sec. 5 of the BrB, book-keeping crime. Thereby, making the tax control more difficult is no longer subsidiary in relation to the book-keeping crime, but normal competition of rules applies. The

legislator presupposed that the problem with the competition of rules would be solved in practice by the prosecutor's formulation of the deed description.[18] The problem often is that the prosecutors' deed descriptions, like the SKV's reports, are fairly imprecise. Thus, the defence lawyers should, in my opinion, pay attention to this, and put questions to the tax auditor in his or her capacity of the prosecutor's witness on the theme of erroneous information regarding how the tax auditor, whose investigation also is the basis for the taxation decision, sets his or her assertion about erroneous information in the VAT return in relation to above all the question about erroneous 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 comply with the individual's legitimate demand of a fair trial. In my opinion, the prosecutor shall not be assisted by the court to enforce a prosecution which only concerns tax fraud, coarse or according to the normal degree, if the prosecutor should have explained in a precise deed description why the prosecution does not regard also the making of the tax control more difficult, when the tax auditor thereafter in the witness inquiry is supporting the prosecutor with a reasoning that should be tried against making of the tax control more difficult or book-keeping crime.

Finally, I may remind of that there is no clear definition of what constitutes VAT fraud by carrousel trading.[19] I consider that it is a phenomenon where questions about both *the tax subject* and *the tax object* are tried starting out from the VAT principle which show itself by the basic principles for what is meant with VAT according to the EU law according to Article 1(2) of the VAT Directive – previously Article 2 of the First VAT Directive (67/227/EEC) – 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 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

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

[19] In the above-mentioned Danish theses are inter alia mentioned an article by Christian Dresager at the Danish Customs and Tax Board (*Danmarks Told- og Skattestyrelse*) from 1999, *Moms-karruselsvig: en svigsmetode der eskalerer* (VAT carrousel fraud: an escalating method of fraud), *Revision og regnskabsvæsen* (Audit and Accounting Service), 1999 *årgång* (annual volume) 68, no. 2, pp. 23-28 (Dresager 1999). At my above-mentioned lecture, 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.

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 are something that came here with Sweden's EU-accession in 1995. It is instead so that the tax authority investigated suchlike cases at least already in the 1980's, which I mention in a book.[20]

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

[20] See section 39, "*'Flygande mattor' och 'karuseller'*" ('Flying carpets' and 'carrousels'), in part 1 of my book *Skatt i skrattspegeln*, Tax in the distorting mirror (self-published 2021), Forssén 2021a, where I, as 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[21]

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 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 GML, by SFS 2007:1376.[22] 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.[23] 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.[24] 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*).[25] The invoicing rules in Ch. 11 of the GML do not stipulate any time limit for the issuing of an invoice,[26] and thus neither for the issuing of a credit note (that is for a credit invoice).

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:

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[21] 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) – abbreviated Balans, Balans 2023 pp. 1–9, published 2023-06-13 on www.tidningenbalans.se. (Forssén 2023a).

[22] The GML was replaced on 1 July, 2023 by the ML, which does not change the problems in the article.

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

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

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

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

- 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)*.[27]

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.[28]

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.[29]

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

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

[29] 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*,[30] 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,[31] 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 *årsredovisningslagen (1995:1554)*, the Annual Accounts Act, abbreviated ÅRL, it follows of 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.[32] 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

[30] See Ch. 13 sec. 6 no. 1 of the GML and prop. 1993/94:99, p. 234.

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

[32] 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.[33]

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,[34] 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, i.e. 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 – 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.[35] 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

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

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

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

collection crime (Sw., *uppbördsbrottet*) was abolished regarding tax deduction at source (Sw., *källskatteavdrag*).[36]

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 conflicts with the principle of legality for taxation measures in Ch. 8 sec. 2 first para no. 2 of the 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,[37] can neither be imposed on false VAT, since the sanction tax surcharge is imposed on *skatter* (taxes) which are comprised by the SFL,[38] 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 investigations by the SKV and the Economic Crime Authority (Sw., *Ekobrottsmyndigheten*,

[36] 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 SFL.

[37] The Swedish tax surcharge is according to the European Court of Human Rights (ECtHR) comparable with *a criminal charge* according to Article 6 of the European Convention of Human Rights (ECHR). See the ECtHR'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 ECHR. 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.

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

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.[39]

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.[40] 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.[41]

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.[42]

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 Ch. 11 sec. 5 first para of the BrB.[43] In my

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[39] In Forssén 2022a, I state 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. The senior judge of appeal, who was dissentient and wanted to acquit the defendant, stated inter alia that the CJEU in Case C-255/02, 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 it must be foreseeable for the individual, where he or she can be subject of criminal law intervention. See Forssén 2022a, pp. 123–125.

[40] See Joined Cases C-354/03, C-355/03 and C-484/03, item 55. See also Forssén 2022a, p. 121.

[41] 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).

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

[43] 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.

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.[44]

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.[45]

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*.[46] 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 having charged the tax*,[47] 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

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

[45] 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.

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

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

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 matter 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*), abbreviated KFM, 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.[48] 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 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

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

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[49]

In my debate article in the DJ, ”*Livsmedelspriserna föranleder lagändringar och planering avseende indirekta skatter*” (Food prices cause alterations of law and planning regarding indirect taxes),[50] I referred to Forssén 2022a, ”*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 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 HFD and the CJEU, in SST 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.

With regard of how the carrousel cases seem to develop, I may 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*).

Not seldom, the EBM 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 matters 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.

The prerequisite intent in the Tax Fraud Act, i.e. the SBL, which together with erroneous information and risk constitute the necessary prerequisites for criminal responsibility according to sec. 2 of the SBL, does not exist in *lagen (2014:307) om straff för penningtvättsbrott* (the [Swedish] Act on Punishment for Money Laundering). The Act on

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

[50] See *ANNEX 1*.

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, he or she who takes certain mentioned measures will be sentenced for money laundering crime, if it 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 has 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 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[51]

1 Introduction

On 2022-11-30, I gave – in Stockholm – a course with the title *Momsbedrägerier genom karusellhandel* (VAT frauds by carrousel trading).[52] I use that title also as 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 the SST in 2022,[53] and the lecture I gave on the topic at Svensk Juriststämma (Swedish Law Meeting) more than two decades ago, on 14 November, 2001,[54] were 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).[55] 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, i.e. the SBL.[56]

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 conflicts with the EU law in the field of VAT, since it follows of Article 1(2) of the VAT Directive 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 transactions take place in the production and distribution process before the stage at which the tax is charged”,[57] and that ”[t]he common system of VAT shall be applied up to and including the retail trade stage”.[58] 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 SKV and the EBM is called a missing trader (or goalkeeper company or front enterprise). Such an enterprise

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[51] 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).

[52] Arranger *Institutet för juridisk utbildning* (the Institute for legal education – IFJU), Stockholm.

[53] Forssén 2022a, i.e. *Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704* (VAT frauds of so-called carrousel type and NJA 2018 p. 704).

[54] Forssén 2001.

[55] See Forssén 2023a.

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

[57] See Article 1(2) first para of the VAT Directive.

[58] See Article 1(2) third para of the VAT Directive.

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 are 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 Forssén 2021a.[59] However, the scope of the problem has escalated the last decades, and today can a single matter comprise billions of Swedish crowns of accounted VAT which can be questioned by the SKV and the EBM. In an interview on the SVT in July of 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*").[60] It has in other words not been helpful that 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 2022a. 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.[61] 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).[62] If justified demands on effective 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 2022a and also to Forssén 2023a.

[59] See Forssén 2021a, part 1, pp. 111-114 ["*'Flygande mattor' och 'karuseller'*" ('Flying carpets' and 'carrousels')].

[60] 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).

[61] 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).

[62] The reciprocity principle follows of Article 1(2) second para and Article 167 of the VAT Directive.

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: the GML was replaced on 1 July, 2023 by the 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 the VAT Directive's concepts, structure and systematics.[63] 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).[64] 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,[65] 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 Ch. 1 sec. 1 first para no. 1 of the GML, 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.[66] Instead of Ch. 2 of the GML 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 Ch. 1 sec. 6 of the GML, is made in the ML. In Ch. 5 sec. 7 of the ML is with *material assets* (Sw., "*materiella tillgångar*") meant the same as the term *goods* (Sw., in the singular, "*vara*") in Ch. 1 sec. 6 first para first sen. of the GML. 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.[67] By Ch. 5 sec. 3 first para and sec. 26 of the ML is the Articles 14(1) and 24(1) respectively of the VAT Directive implemented, that is the main rules of what constitute taxable transactions regarding supply of goods and regarding supply

[63] See prop. 2022/23:46, p. 1.

[64] 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).

[65] See Forssén 2020a, pp. 388.

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

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

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 Ch. 5 sec. 3 first para and sec. 26 respectively of the ML, 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 respectively according to Ch. 1 sec. 6 of the GML and thereafter concerning whether a transaction of goods or service respectively existed according to Ch. 2 sec. 1 of the GML. Other questions about the tax object are the same in the ML as in the GML, that is concerning 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,[68] 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 of the TFEU is corresponding with the main rule of supply of services, that is Ch. 5 sec. 26 of the ML and Article 24(1) of the VAT Directive, by the negative determination of services causing that those are not comprised by efforts falling under the free movement of 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 of the 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

[68] See Ch. 5 sec. 7 of the ML and Article 15 of the VAT Directive.

and enterprises in the Member States.[69] 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.[70] In both those cases the preliminary judgement of service in article 57 of the 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 of the 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 Implementing Regulation, 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.[71] 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 of the TFEU and that it applies also in other fields than the field of tax, if the EU's institutions have been conferred competence in the field in question.[72]

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 sec. 1 first para no. 1 of the FML, 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 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 sec. 17 of the FML 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

[69] The four freedoms are to be found in: Article 28 of the TFEU, regarding goods; Article 56 of the TFEU, regarding services; Article 45 of the 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 of the TFEU.

[70] 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).

[71] 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.

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

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 of the TFEU – regarding what makes the taxable event, that is taxable transactions in the form of delivery of goods and supply of services respectively.[73] 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.[74] 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*").[75] 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 that respect in pursuance of Article 113 of the 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 sec:s 17 and 18 of the FML. 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

[73] 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."

[74] See also Forssén 2020b, p. 726.

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

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 2022a, 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, *Momskarruselsvig: en svigsmetode der eskalerer* (VAT-carrousel fraud: a method of fraud escalating).[76] 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 2022a 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 2022a. In one of those 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*").[77] 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 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*".[78]

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[76] See Dresager 1999.

[77] 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.

[78] 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.

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?*[79]

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 2022a, I mention inter alia that reverse tax liability – nowadays reverse liability of payment – exists for intra-Union acquisitions of goods (IUA) 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.[80] 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.[81] 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.

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.[82] 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.[83]

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[79] 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.

[80] See Forssén 2022a, pp. 118 and 119.

[81] See prop. 1994/95:57, p. 79.

[82] 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 and Forssén 2022a, p. 119.

[83] See SFS 2009:1333 (and SFS 2009:1334) and prop. 2009/10:15. See also Forssén 2022a, pp. 118 and 119.

In Forssén 2022a, 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 too 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.[84] 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).[85] 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 2022a, 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 that this was not decided for VoIP, but only for the trading between enterprises regarding mobile phones.[86] Thereby, the government gave up in the bill its proposal of 2020-04-17,[87] 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 Implementing Regulation as an example of telecommunications services according to Article 24(2) of the VAT Directive.[88] By the way, the Danish parliament adopted on 1 June, 2023

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[84] See Forssén 2022a, p. 120.

[85] See Ch. 1 sec. 2 first para no, 4 f and seventh para of the GML, its wording according to SFS 2020:1220 (and 1221). See also prop. 2020/21:20.

[86] See Forssén 2022a, p. 119.

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

[88] See Forssén 2022a, p. 119.

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.[89] 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 Implementing Regulation, which is a legislation directly applicable in each Member State according to Article 288 second para of the 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 Implementing 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 normally being connected questions, whereas 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 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 2022a, 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.[90]

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[89] 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).

[90] See Forssén 2022a, p. 129.

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 Ch. 1 sec. 1 third para and sec. 2(e) of the GML, 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.[91] 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.[92] 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*).[93] 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”,[94] but, for pedagogical reasons, I do not use in this article *liable of payment* (Sw., *betalningsskyldig*) regarding persons who are comprised by Ch. 16 sec. 23 of the ML 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 invoices with VAT which do not correspond to any real transaction (fictitious transactions)*.[95] 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,[96] and in this article I mention something about the consequences that

[91] Ch. 1 sec. 1 third para and sec. 2(e) § of the GML are corresponded by Ch. 16 sec. 23 of the ML.

[92] See Ch. 13 sec. 27 of the GML, which is corresponded by Ch. 7 sec. 49 first para of the ML.

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

[94] See Articles 192a–205 of the VAT Directive.

[95] See prop. 2007/08:25, p. 91.

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

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 Ch. 8 sec. 2 first para of the GML 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.[97] By the liability of payment for 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 VAT shall the measure not lead to anything else than a liability of payment.[98] 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.[99]

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 as 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,[100] 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 in Article 9(1) first para of the VAT Directive.[101] 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 Ch. 4 sec. 1 of the GML. In my doctor's thesis, which concerned the rule on tax and payment liability in *enkla bolag* (approx. joint ventures) and *partrederier* (shipping partnerships), Ch. 6 sec. 2 of the GML,[102] I repeated the side issue D.[103] In Forssén 2020a, I stated, as mentioned above, that it was a step in the right

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

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

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

[100] 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).

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

[102] See Forssén 2013.

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

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*),[104] 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 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.[105] That *sammanslutningar* and *partrederier* are regarded as tax subjects according to sec. 2 first para and sec. 13 of the FML, whereas *enkla bolag* and *partrederier* are not considered constituting tax subjects according to Ch. 6 sec. 2 of the GML 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,[106] which I repeated in Forssén 2019b.[107] 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.

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 GAAP,[108] and the liability of payment presupposes according to the main rules in Ch. 3 sec. 1 of the ML that delivery of goods or supply of services for consideration has been made within the country by a taxable person acting in this capacity,[109] 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

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[104] See Forssén 2020a, p. 388.

[105] 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).

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

[107] See Forssén 2019b, pp. 61 and 62. Ch. 6 sec. 2 of the GML is corresponded 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 Ch.4 sec. 16 of the ML 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 SFL. Therein is the concept activity (Sw., *verksamhet*) used, but in Ch. 4 sec. 16 of the ML, 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 Ch. 5 sec. 2 of the SFL by the reform on 1 July, 2023: see prop. 2022/23:46, p. 173.

[108] See Ch. 7 sec. 14 no. 1 of the ML. See also prop. 1993/94:99, p. 234.

[109] See Ch. 3 sec. 1 no. 1 and 3 of the ML.

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),[110] 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 BFL, i.e. the Book-keeping Act, 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 ÅRL, it follows of 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.[111]

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*. 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 the balance sheet or as postponed tax in a note in the annual report.[112] 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.[113]

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

[110] See Ch. 17 sec. 10 of the ML.

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

[112] 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.

[113] See prop. 1998/99:130 Part 1, p. 303.

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,[114] 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.[115] 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. 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

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

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

collection crime (Sw., *uppbördsbrottet*) was abolished regarding tax deduction at source (Sw., *källskatteavdrag*).[116]

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 (Ch. 26 sec. 7 of the SFL), unlike a real VAT which is accounted for in a VAT return (Ch. 26 sec. 21 of the SFL). 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 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 SFL 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.[117]

To determine what is *skatt* (tax) materially by a procedure rule in the SFL conflicts with the principle of legality for taxation measures in Ch. 8 sec. 2 first para no. 2 of the 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,[118] can neither be imposed on false VAT, since the sanction tax surcharge is imposed on *skatter* (taxes) which are comprised by the SFL,[119] 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 Ch. 8 sec:s 2 and 3 of the GML. In such a case, criminal law responsibility can be of interest also for he or she who has issued the invoice with the false VAT, namely

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[116] See prop. 1996/97:100 Part 1, p. 450; the Tax Payment Act, *skattebetalningslagen (1997:483)*, which was replaced on 1 January, 2012 by the SFL.

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

[118] The Swedish tax surcharge is according to the ECtHR comparable with *a criminal charge* according to Article 6 of the ECHR. See the ECtHR'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 ECHR. See prop. 2002/03:106, p. 245.

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

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 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.[120]

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.[121] 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.[122]

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.[123]

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

[120] In Forssén 2022a, I state 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. The senior judge of appeal, who was dissentient and wanted to acquit the defendant, stated inter alia that the CJEU in Case C-255/02, 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 it must be foreseeable for the individual, where he or she can be subject of criminal law intervention. See Forssén 2022a, pp. 123–125.

[121] See Joined Cases C-354/03, C-355/03 and C-484/03, item 55. See also Forssén 2022a, p. 121.

[122] 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).

[123] 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.[124] 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.[125]

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 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 2022a, 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*.[126]

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 my noticing of the nuance of what my expression *in itself* (Sw., "*i sig*") means, why the readers of Swedish Tax Journal get 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 DJ 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.[127] However, I may, for the research and to the legislator, emphasize my own viewpoints, and repeat these 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.

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[124] 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.

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

[126] See Stig von Bahr, *Mer om missbruk och momsbedrägeri* (More about abuse and VAT frauds), SST 2022, pp. 498-504, 499 (von Bahr 2022).

[127] 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), DJ (*debatt*/debate), published 2023-03-15 (Forssén 2023d). By the way, Forssén 2023a is also published after Forssén 2022a and von Bahr 2022. However, Forssén 2023a was written as a follow-up to Forssén 2022a, and I submitted the manuscript to the 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 the Balans has been appreciated, when I during the last few years thereby has produced material to my – since 2015 – yearly recurrent lectures and seminars on the EU Master programme at Södertörn University (Stockholm).

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.[128] 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 sec:s 3 and 7 of the Act on Punishment for Money Laundering 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 sec. 2 of the SBL 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 that for example money originating from crime or criminal activity etc.[129] Thus, I consider – like what I stated in Forssén 2022a – 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 matter 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

[128] See sec:s 3 and 7 of the Act on Punishment for Money Laundering.

[129] 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.

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 conformed 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 Implementing 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 of the 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.

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 of the 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 matters 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 matter 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.[130] 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 of not necessarily being needed 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 VoIP (which 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 Ch. 1 sec. 1 third para and sec. 2(e) of the GML (nowadays Ch. 16 sec. 23 of the ML) 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 long 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 not 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 Ch. 13 sec. 4 no. 1 and 2 of the ML (previously Ch. 8 sec. 2 first para of the GML).

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

[130]. Forssén 2001.

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 a matter 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 Case C-412/03 (Hotel Scandic Gåsabäck),[131] 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.[132]

- The revaluation rules mean that under certain suppositions shall a too low or too high price (consideration) regarding the goods or the service cause a revaluation of the taxable amount for VAT by the vendor,[133] so that the taxable amount is determined to market value.[134]

[131] ECLI:EU:C:2005:47.

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

[133] See Ch. 7 sec:s 3(a)–3(d) of the GML which are corresponded by Ch. 8 sec:s 17–19 of the ML.

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

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 Ch. 8 sec. 19 first para of the ML *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 Ch. 8 sec. 19 second para of the ML 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 VAT Directive 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 of the Sixth VAT 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 matters 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 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 matter, where market value is a general aim for the pricing not causing withdrawal taxation.[135] 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 (zero) 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

[135] See Ch. 22sec:s 3 and 4 of the IL.

tax fraud case and the taxation question is not broken.[136] 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 matters 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 similar, compensation for taxes and fees and other additions to the price except interest. See Ch. 8 sec. 13 of the ML and Article 78 first para a and b of the VAT Directive.[137] In an article in the Balans, 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.[138]

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

[137] Ch. 8 sec. 13 of the ML 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 Ch. 7 sec. 3(a) of the GML 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 lacking an equivalent in the rules on taxable amount in Article 11A(2)(a) and (b) in the Sixth VAT 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.

[138] 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 1/2018 pp. 3–10. (Forssén 2018a).

In Forssén 2018a, 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 Ch. 9(c) of the GML 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 Ch. 11 sec:s 10 and 11 of the ML, 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.[139]

In Forssén 2018a, I use in an example one of the sorts of goods enumerated in Ch. 11 sec. 3 of the ML, 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.[140] 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.[141] In my example, I assume that a limited company (Sw., *aktiebolag*) in Sweden has placed goods – which come from another Member State than 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.[142] According to Article 9 of the Implementing 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 Ch. 10 sec. 33 first para and third para no. 1 of the ML and Article 135(1)(f) of the directive.[143] The goods – the quantity of copper – are also sold VAT free when placed in the tax warehouse according to Ch. 11 sec. 4 no. 4 of the ML compared with sec. 3 no. 2 of the ML.[144] 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 those further, which thus is a taxable transaction.

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[139] See Forssén 2018a, pp. 4-7.

[140] The headline to Ch. 11 of the ML is *Varor i skatteupplag* (Goods in tax warehouses), whereas the headline to Ch. 9(c) of the GML was *Särskilt om varor i vissa lager* (Especially about goods in certain warehouses). Ch. 11 sec. 4 of the ML stipulates the exemptions regarding tax warehouses and inter alia regarding installation for temporary storage, customs warehouse or free zone. In Ch. 2 sec. 24 of the ML, 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.

[141] See Forssén 2018a, p. 3.

[142] See Forssén 2018a, pp. 5-7.

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

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

Thus, I state in Forssén 2018a 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.[145] Such a 'VAT carrousel' is of course also of interest for the legislator. In Forssén 2018a, 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.[146]

In Forssén 2018a, 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 alignment of interests (Sw., *intressegemenskap*) with the purpose of taking measures about artificial deviations from prices set between unrelated parties.[147] 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 matters 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

[145] See Forssén 2018a, p. 9.

[146] See Forssén 2018a, p. 7.

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

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 matter can comprise billions of Swedish crowns. The HD-case NJA 2018 p. 704, which I analysed in Forssén 2022a, 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 matter that led to the mentioned HD-case.

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'. Since 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 being 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 those 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 2022a. In his complement to Forssén 2022a, 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 of 'VAT carrousels' should be made in the research and by the legislator, so that also income tax questions are regarded in that respect. In my opinion, it conflicts with the legal certainty in the procedure concerning the phenomenon in question when the SKV and the EBM only focus on the VAT in their investigations but mix it 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 Ch. 9 sec. 1 of the BrB, 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, such questions seem not to 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 those 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.[148]

[148] 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.

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.

V. Competition advantages with transactions of goods after VAT free transactions of goods in certain warehouses and of financial services[149]

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 the GML,[150] as well as according to the EU's VAT Directive 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 those 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:

- 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),

[149] 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, Balans 1/2018 pp. 3–10, published 2018-01-18 on www.tidningenbalans.se. (Forssén 2018a).

[150] Note! The GML was replaced on 1 July, 2023 by the 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 sold during the time being 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 being 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 Ch. 9(c) sec. 9 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 those 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 being taken out from such a warehouse and thus 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 being taken out from such a warehouse and thus 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 lacking an equivalent in the rules on taxable amount in Article 11A(2)a and b of the Sixth VAT 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 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 11A(2)(b) of the Sixth VAT 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 11A(2)(b) last part of the Sixth VAT 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.[151]

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 HFD must, however, not a hidden interest compensation lowering 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 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.

[151] See prop. 2002/03:5, p. 108.

> 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*.[152]

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 being 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 of 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 those were 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 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

[152] 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.

motives, and the problem does not seem to have been addressed yet in theses in the field of VAT,[153] 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, with reservation for abusive practice might be deemed existing if the same goods are repeatedly comprised by such measures that I am describing here during the time those are placed in a tax warehouse, I consider 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 % × 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.

  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 % × 10,000).

[153] 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.

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 % × 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 % × 40 or 20 % × 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 × 40). Thus, the price to consumer is SEK 12,475 including VAT [9,980 + 2,495 (25 % × 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 Implementing 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 Implementing 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 being 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 Ch. 9(c) of sec. 9 – 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.[154] Concerning proceedings may furthermore be mentioned that it is the SKV that has the burden of proof regarding the size of the transaction,[155] 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.

- 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.[156]

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[154] 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.

[155] 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*.

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

- 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 Implementing 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).[157]

    - 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 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 those 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 being placed in the tax warehouse.

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[157] 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, SST 2017, pp. 95–106 (Forssén 2017a).

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 those 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

In the following, I reason especially about Article 9 of the Implementing 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.[158]

Article 9 of the Implementing 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 Implementing 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)

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

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 Implementing Regulation. I consider that a concept like trading of securities also in the future should be developed by the CJEU's case-law, as what has already been done by Case C-2/95 (SDC) meaning that trading of securities comprises documents which alter the legal and financial situation between the parties. Already by 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. In my opinion, Article 9 of the Implementing Regulation especially for options stipulating what already follows of the CJEU's case-law can give the impression 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 of 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 Implementing 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.[159] 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.

Conclusions and proposals on research or law alterations

Conclusions

I have not found anything in the EU's VAT Directive or in the Implementing Regulation disqualifying a matching/set-off of a VAT free transaction of goods taking place during the time those 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 taken out

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

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 BEPS. 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 of the IL 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*").[160] 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 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.

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

VI. Current official report does not solve the problem with VAT frauds[161]

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 those 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.[162]

The report states that the national regulation of the mentioned phenomena is to be found in sec. 2 of the Tax Fraud Act, i.e. the 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.[163]

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

[161] Article: *Aktuell utredning löser inte problemet med momsbedrägerier* (Current official report does not solve the problem with VAT frauds), by Björn Forssén, Balans 2024 pp. 1–11, published 2024-05-06 on www.tidningenbalans.se. (Forssén 2024a). Forssén 2024a is also available on www.forssen.com.

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

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

[164] 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 sec. 2 of the SBL, but the criminality can also comprise other classifications of the crime.[165]

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.[166] According to the suggestion, the expression *in another way than orally* (Sw., ”*på annat sätt än muntligen*”) will be abolished inter alia in sec. 2 of the SBL. Furthermore it is suggested that a new rule, sec. 2(a), will be introduced in the 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*”).[167] In consideration of the rules on tax surcharge (Sw., *skattetillägg*) of the SBL and the SFL being strongly connected, the report suggests that alterations corresponding to those suggested in the SBL will also be made in the SFL.[168] This means that the expression *in another way than orally* (Sw., ”*på annat sätt än muntligen*”) will be abolished from Ch. 49 sec. 4 of the SFL and that a new item, 3, will be added into Ch. 49 sec. 5 of the SFL with the same new case of erroneous information regarding VAT as according to the proposed new rule – sec. 2 (a) – of the SBL.[169] The new rules are suggested to come into force on 1 July, 2024.[170]

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 sec. 2 of the SBL. 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

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

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

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

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

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

[170] 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 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.[171] 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 EBM's 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 Ch. 59 sec:s 12–21 of the SFL.

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.[172]

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

[172] 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 sec. 2 of the SBL, 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 Ch. 46 sec. 5 of the SFL and sues the owners at the administrative court for personal liability of payment (Sw., *företrädaransvar*) according to Ch. 59 sec. 16 of the SFL, 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 ECHR.

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 sec. 2 of the SBL. 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 KFM 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.[173]

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 sec. 2 of the SBL. SOU 2023:49 mentions a decision by the 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*).[174] I have commented NJA 2018 p. 704 in an article in the SST in 2022.[175] 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.[176]

Stig von Bahr, formerly judge in the HFD and the CJEU, wrote a completing article in Swedish Tax Journal in 2022.[177] 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*)*

[173] See prop. 1996/97:100 Part 1, p. 450. Inter alia the Tax Payment Act was replaced on 1 January, 2012 by the SFL.

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

[175] See Forssén 2022a.

[176] See Forssén 2022a, p. 125.

[177] See Stig von Bahr, *Mer om missbruk och momsbedrägeri* (More about abuse and VAT frauds), SST 2022 pp. 498–504 (von Bahr 2022).

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.[178] In two articles in the DJ, I state as in Forssén 2022a 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.[179] SOU 2023:49 contains nothing about either my interpretation in Forssén 2022a or the interpretation in von Bahr 2022 of NJA 2018 p. 704.[180] 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 sec. 2 of the SBL 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.[181] However, the report does not at all go into what rules according to the SBL or other criminal law legislation if it is a matter of issuing a fictitious invoice where an amount quite simply is denoted value-added tax or VAT without any real delivery of goods or real supply of service actually taking place, that is like when it in the report’s example of the simplest version of the procedure at carrousel frauds would be a matter of falsely charged VAT of 22,500 Swedish crowns in the invoice from B to C. Therefore, I account for in short what I in that respect have stated in the Balans in 2023.

In the Balans, I have in 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.[182] These questions are not mentioned in SOU 2023:49. According to Article 203 of the EU’s VAT Directive, *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) of the GML, by SFS 2007:1376. The GML was replaced on 1 July, 2023 by the ML and there is to be

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

[179] See Forssén 2023d. See also Forssén 2023b. I mention both articles also in my article of 2023-11-27: ”*Felaktigt debiterad moms föranleder betalningsskyldighet – inte skattebrott – ’karusellen’ går vidare*” (Falsely charged VAT causes liability of payment – not tax fraud – the ’carrousel’ goes on), Forssén 2023f (*ANNEX 2*).

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

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

[182] See Forssén 2023a.

found the corresponding rule in 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.[183] 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 (Ch. 26 sec. 7 of the SFL). It is only the person who shall account for real VAT in a VAT return (Ch. 26 sec. 21 of the SFL) who shall register to VAT.[184] 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 sec. 2 of the SBL, since any erroneous information regarding *tax* (Sw., *skatt*) that shall be accounted for in a VAT return does not come up thereby. By false VAT not constituting tax for VAT purposes can neither tax surcharge be imposed on the amount in question. The only consequence is procedural and means that the liability of payment shall be fulfilled according to the SFL, by the false VAT being accounted for in a special tax return and paid.

- However, tax fraud – and/or tax surcharge – can be present for the receiver of the fictitious invoice, if he or she has given erroneous information in his or her VAT return, by accounting for the false VAT as input tax. In the example from the report, it would be wrong by C, since right of deduction is lacking regarding the amount due to B not being liable of payment according to the general VAT rules, but only liable of payment according to the special rule that was introduced in 2008. Thus, C can be deemed committing tax fraud due to the erroneous information, and B as issuer of the fictitious invoice can be imposed criminal law responsibility only for complicity in the tax fraud, according to Ch. 23 sec. 4 of the BrB.

- On the theme book-keeping crime according to Ch. 11 sec. 5 first para of the BrB, 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

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

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

> enterprise's annual report, and the balance of the business thereby cannot be judged on the whole.[185]

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 Ch. 59 sec. 13 of the SFL 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 Ch. 59 sec. 14 of the SFL 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.[186]

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

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

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

[187] See Forssén 2023c.

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 sec. 2 of the SBL 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 Ch. 11 sec. 5 first para of the BrB?

By the way, it is concerning the question on terminology equally remarkable that the report SOU 2023:49 does not await or at least mention the report ”*Att kriminalisera överträdelser av EU-förordningar*” (To criminalize transgressions of EU-regulations), SOU 2020:13. That report is about a survey of what techniques of legislation that are used at criminalization of transgressions of EU-regulations within various fields in Sweden and a selection of other EU Member States. In Forssén 2022a, 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.[188] 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 Implementing

[188] See Forssén 2022a, p. 129. Cp. also above: chapter I., section 4 and chapter IV., sections 4.2 and 8.2.

Regulation, mention the following.[189] 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 is 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 the RF.[190] The criminal law is, however, another example of a field where in principle an exclusive national competence prevails.[191] 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*".[192] In SOU 2023:49 there is no reasoning concerning the principle of conferred competence – which is also named the principle of legality.[193]

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, Ch. 9 sec. 1 of the BrB. I suggest this in the end of Forssén 2023c,[194] and repeat it here with a further commentary:

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[189] 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 Part 1, pp. 157 and 158.

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

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

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

[193] See e.g. sections 1.1.3 and 1.2.3 in Forssén 2013, where I inter alia mention the principle of conferred competence according to Ch. 10 sec. 6 of the RF 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.

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

- 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.[195] 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 also already in 2021.[196] 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' legislations on double criminality of interest.[197] 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.[198] 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.[199] The question on double criminality in the

[195] 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.

[196] See Björn Forssén, "*Rätt resurs på rätt ställe minskar momsbedrägerierna*" (The right resource on the right place decreases the VAT frauds), DJ (*Debatt*/Debate), published 2021-05-05, at 11.07, on www.dagensjuridik.se. (Forssén 2021b, *ANNEX 3*).

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

[198] See regarding rules against money laundering and commercial money laundering in Sweden: 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.

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

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, Ch. 9 sec. 1 of the BrB, 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).[200] In the context, it may be mentioned that it was suggested in the government's bill 2023/24:87 that Sweden should participate in the EPPO. Examples of crimes which can be referred under the EPPO's authority are money laundering and cross-border tax crimes regarding VAT.[201]

By the way, it should 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 the Balans of 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 mentioned under *Yrkesvardag* in the Balans of 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 Balans shows that the majority of the parties in the parliament says no to a reintroduction of auditing liability for the smallest enterprises.

[200] 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.

[201] Note that Sweden joined the EPPO on 1 October, 2024, by the introduction of *lag (2024:461) om Sveriges deltagande i Europeiska åklagarmyndigheten*, i.e. the Swedish Act on participation in the EPPO.

VII. Middlemen and questions about carrousel trading and profit margin taxation – a comparison of the old and the new VAT act in Sweden[202]

1 Presentation of the questions in this article

In this article, I address the problem whether a middleman – an intermediary – regarding questions about value-added tax (VAT) shall be deemed having the character of an ordinary intermediary (an agent) or whether the representative shall be regarded doing business on a commission basis, which I denote having the character of commissioner or commission trading. Based on my own experience within the tax authority of Sweden and as a legal representative for entrepreneurs in tax cases, I deem that the theme of commissioner or not commissioner with regard of VAT is about two main issues. These concern matters on assertion of VAT frauds of a so-called carrousel type, that is such a carrousel trading that I call 'VAT carrousels' and matters where the intermediary is a retailer of second-hand goods, works of art, collector's items and antiques and the question concerns whether such trading is comprised by the special scheme of profit margin taxation (PMT). In this article, I bring up and problemize both cases concerning whether Swedish VAT law regarding the mentioned theme is complying with the EU's VAT Directive.

I have previously mentioned the intermediary question in the JFT with regard of the Swedish VAT reform on 1 July, 2023 meaning that the GML was replaced by the ML.[203] The rule that I am analysing in this article was to be found before the reform in Ch. 6 sec. 7 of the GML and in its predecessor, first para of item 3 of the instructions to sec. 2 of the VAT Act, *lag (1968:430) om mervärdeskatt*. The rule constituted in relation to the general VAT rules of the legislation one of the special rules on who is tax liable of VAT (nowadays liable of payment of VAT) in certain cases.[204] In this article, I also call the special rule in question a special 'VAT commission rule'. The obvious problem with the special rule in question is, for the sake of a correct implementation of the VAT Directive, that the nearest corresponding rules in the VAT Directive would be considered carried out by a common special rule, Ch. 6 sec. 7 of the GML, instead of in one rule for goods and one rule for services like in the directive rules Article 14(2)(c) and article 28. Here, I express Ch. 6 sec. 7 of the GML and Article 14(2)(c) and Article 28 of the VAT Directive respectively:

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[202] Article: *Mellanmän och frågor om karusellhandel respektive vinstmarginalbeskattning – en jämförelse av gamla och nya mervärdesskattelagen i Sverige* (Middlemen and questions about carrousel trading and profit margin taxation – a comparison of the old end the new VAT act in Sweden), by Björn Forssén, JFT 4/2024 pp. 294–329 (Forssén 2024b).

[203] See Björn Forssén, *Momsreformen i Sverige – flera minus än plus beträffande implementeringen av bestämmelserna i EU:s mervärdesskattedirektiv* (The VAT reform in Sweden – more minus than plus regarding the implementation of the EU's VAT Directive), JFT 1–2/2024, pp. 48–82. (Forssén 2024c). Forssén 2024c is available on www.forssen.com.

[204] See Ch. 1 sec. 2 sixth para of the GML, where it was stated that *special rules on who is tax liable in certain cases exist in Ch. 6, Ch. 9, and Ch. 9(c)* ("*särskilda bestämmelser om vem som i vissa fall är skattskyldig finns i 6 kap., 9 kap. och 9 c kap.*"), and the special rule in question is to be found in Ch. 6 sec. 7 of the GML.

Ch. 6 sec. 7 of the GML (in my translation)

If anyone acting in his own name mediate goods or services on behalf of another person and receives the payment for the goods or services shall, at the judgment of the tax liability for the transaction of goods or services, this be deemed made by himself as well as by his mandator.

Art. 14(2)(c) of the VAT Directive

"2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale."

Art. 28 of the VAT Directive

"Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself."

By the ML the special intermediation rule Ch. 6 sec. 7 of the GML was altered, so that it nowadays consists of two rules, Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML, which in principle corresponds with the mandatory rules of the VAT Directive, that is Article 14(2)(c) and Article 28. The two rules in the ML have the following wordings:

5 kap. 3 § andra stycket 3 of the ML (in my translation)

With supply of goods shall also be meant transfer of goods in pursuance of a commission agreement on purchase or sale.

5 kap. 27 § of the ML (in my translation)

If a taxable person in his own name but on behalf of another person takes part in a supply of services, the taxable person himself shall be deemed acquiring and supplying these services.

In a before and after-perspective of the VAT reform of 2023 in the present respect, I moreover note that the criterion about the middleman *receiving the payment for the goods or services*, which existed in Ch. 6 sec. 7 of the GML as well in its predecessor, first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968, has not been transferred to Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML.[205] Then, I note that the expression *in his own name*, which existed in Ch. 6 sec. 7 of the GML as well as in the predecessor of the VAT Act of 1968, has not been transferred from Ch. 6 sec. 7 of the GML to Ch. 5 sec. 3 second para no. 3 of the ML, which is in compliance with Article 14(2)(c) of the VAT Directive, where that

[205] First para of item 3 of the instructions to sec. 2 of the VAT Act of 1968 had the following wording (in my translation): *He who in the capacity of intermediary in his own name mediate goods or services stated in sec. 2 first para is tax liable if he receives the payment for the goods or services, for example as commissioner at a sale on a commission basis*.

expression does not exist concerning intermediary situations constituting commission trading of goods. Instead, the expression *in his own name* is to be found in Article 28 of the VAT Directive concerning middleman situations regarding supply of services, and in correspondence with that it has been retained in Ch. 5 sec. 27 of the ML. A correct implementation in the Swedish VAT legislation of the directive rules regarding intermediary situations concerning commission trading of goods and supply of services respectively may in my opinion thereby be deemed existing nowadays, by the introduction of the ML.

The problem with treating middleman situations in accordance with the Swedish VAT legislation before the ML was introduced consists of the SKV and the EBM, in for example matters and cases where they stated that VAT frauds of so-called carrousel type (carrousel trading) occurred, asserting that the expression *in his own name* in older Swedish VAT law regarded *commissioners and comparable representatives*. Then, the SKV has claimed that also a representative *comparable* with a commissioner would be comprised by the general VAT rules like an ordinary retailer, instead of being deemed an ordinary agent, only because the representative receives the payment from the customer, if it was not possible to identify the mandator in the invoice that the representative issued to the customer. The basic problem that I am bringing up in this article concerning questions about commission trading with respect of VAT regards two main issues on that theme. One is about whether what I – in a figurative sense – call a rubber band has existed, so that the concept commissioner was expanded to comprise also *comparable representatives*. The result of this was that the middleman would be deemed an ordinary retailer according to the general VAT rules and the tax assessment basis constituting the whole sales price to customer. According to the SKV, such a special ’VAT commission rule’ existed, in the way I have recently described, in the Swedish VAT legislation according to older Swedish VAT law, that is in Ch. 6 sec. 7 of the GML and in its predecessor, first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968.[206]

Before I analyse the complex of problems in question, I account briefly for the economical consequence for a middleman of the SKV being able to invoke a special ’VAT commission rule’ for example in cases of asserted carrousel trading and in cases where the special scheme of PMT could be disqualified due to such a rule for a retailer dealing with second-hand goods, works of art, collector’s items or antiques. The consequences thereof are in my opinion the following:

- If the middleman – the intermediary – in a case of asserted carrousel trading is deemed to be a commissioner or *a comparable representative*, his tax assessment basis will not only consist of the commission from the mandator. Then, the middleman will be deemed making the same transaction as the mandator, and his tax assessment basis constitutes the whole sales price to customer. Furthermore, the middleman will in such a case be deemed acquiring from the mandator of the mediated goods or services.

- If a middleman in the capacity of a taxable retailer is dealing with second-hand goods, works of art, collector’s items and antiques and fulfilling the criteria for PMT, he can charge VAT only on the actual profit margin at his sale to customer, instead of on the whole sales price. Instead of the special scheme of PMT in Ch. 20 of the ML,

[206] See Forssén 2024c, pp. 64–67, that is section 6 with the headline *”Förändringen av specialregeln om skattskyldighet för förmedlare – ’momskommissionsregeln”* (The alteration of the special rule for intermediaries – ‘the VAT commission rule’).

previously Ch. 9(a) of the GML, the person in question may always choose to *apply the general VAT rules* in the ML, previously the GML.[207] Thus, it is – and was also previously – voluntary to apply PMT if the criteria are fulfilled, and in cases where the SKV is stating that the criteria for PMT are not fulfilled, the question is whether ordinary mediation can be invoked as an alternative to PMT. If the middleman can state that an ordinary agent situation exists, the taxable amount will be the same as the commission. The commission constitutes the same tax assessment basis as if PMT would be approved by the SKV, instead of the taxable amount being deemed the sales price for the goods received from customer.

Thus, it can be established that the determination of the middleman's VAT situation has a significant economic importance for him, and it has also a criminal law importance for him, where the EBM connects to the SKV's standpoint that a special 'VAT commission rule' would exist with the above-mentioned consequences.

With this article, I am aiming to give a before and after-perspective due to the VAT reform of 2023 on what I mention above as the two main issues about the theme commission trading or not commission trading with respect of VAT. To carry out the analysis and making conclusions thereof, I outline the article in the following way.

In the nearest following section, the background is developed to the question if there existed a special 'VAT commission rule' according to older Swedish VAT law, that is according to Ch. 6 sec. 7 of the GML and according to the predecessor, first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968 respectively.[208] Thereafter a certain comparison is made with the Finnish VAT act and the Danish VAT act for the judgment of the question if there existed a special 'VAT commission rule' according to older Swedish VAT law.[209] Moreover, it is important for the context to treat the circumstance meaning that a middleman who is deemed a commissioner also can be regarded supplying a special intermediation service to the mandator.[210] A review is specially made concerning the background to the choice of carrousel trading as one of the main issues to problemize in this article of the question whether a special 'VAT commission rule' has existed.[211] Thereafter is the question treated whether carrousel trading and composite transactions consisting of an electronical product constitutes goods and a licence for the operating system.[212]

Moreover, the other main issue to be treated in this article regards the question if a special 'VAT commission rule' has existed according to older Swedish VAT law. That case concerns the question whether such a special rule existed, so that the SKV by referring to it could disqualify a retailer's application of PMT when dealing with second-hand goods, works of art,

[207] See Ch. 20 sec. 5 of the ML.

[208] See section 2.

[209] See section 3.

[210] See section 4.

[211] See section 5.

[212] See section 6.

collector's items, and antiques.[213] In the light of the analysis in this article showing that the SKV's standpoint, meaning that a special 'VAT commission rule' has existed in older Swedish VAT law, can be questioned, is finally the question treated whether the consequences thereof in the two main cases in this article are such that a re-trial can be brought up in tax cases and tax fraud cases about these.[214] Under Concluding viewpoints, I express my conclusion whether it may be deemed clarified by the VAT reform of 2023 that the special rule in question regarding intermediary situations does not exist anymore and give in that respect certain viewpoints for the context concerning questions on legal certainty and on registration control and collection.[215]

2 The background to the question on a special 'VAT commission rule' in older Swedish VAT law

The problems with the question whether a special 'VAT commission rule' existed according to older Swedish VAT law[216] consists of the SKV often stating that this was the case and that the SKV by virtue thereof could claim that a middleman, by his effort (the mediation), made the same transaction of goods or services as the mandator, regardless of whether an agreement on commission trading existed between them. The SKV's standpoint meant that Ch. 6 sec. 7 of the GML in that way constituted a *rubber band* whereby the middleman could be compared for VAT purposes with a retailer regarding goods or services to consumer simply by virtue of that special rule. The rule had its origine in third para first sen. in the instructions to sec. 12 of *Kungl. Maj:ts förordning (1959:507) om allmän varuskatt* (i.e. the 1959 Act on General Tax on Goods), which had the following wording (in my translation): *At sales in commission the commissioner is deemed as a vendor*.

When the VAT replaced the General Tax on Goods in Sweden on 1 January, 1969, by the VAT Act of 1968, the rule in question was transferred to first para of item 3 of the instructions to sec. 2 in that act, where it comprised *a representative* who *in his own name mediate goods or services if he receives the payment for the goods or services, for example as commissioner at a sale on a commission basis*.[217] The SKV has taken as its starting-point that its predecessor, *Riksskatteverket*, the National Tax Board, abbreviated RSV, in its handbook considered that commissioner was only an exemplification on application of the special rule.[218] Moreover, the SKV has stated that it in the preparatory works to the VAT Act of 1968 was mentioned that the expression *in his own name* would regard *commissioners and comparable representatives*.[219] The fact that the exemplification in question was abolished in

[213] See section 7.

[214] See section 8.

[215] See section 9.

[216] That is in Ch. 6 sec. 7 of the GML and in its predecessor, first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968.

[217] See section 1.

[218] See *RSV:s Handledning för mervärdesskatt 1993*, the RSV's handbook for VAT 1993, (*RSV 553 utg 6*), p. 71.

[219] See prop. 1968:100 (*Kungl. Majt:s proposition till riksdagen med förslag till förordning om mervärdeskatt, m.m.* – the government's bill to the parliament with proposal for a regulation on VAT, etc.), p. 121. See also Björn Forssén, *'Momskaruseller' och ändringen av den särskilda förmedlingsregeln genom nya*

Ch. 6 sec. 7 of the GML, when the GML replaced the VAT Act of 1968 on 1 July, 1994, was according to the legislator due only to it being considered as *unnecessary*.[220] The SKV has also in its handbook expressed that Ch. 6 sec. 7 of the GML shall apply *for example at sales in commission*.[221]

Thus, the SKV has ever since the VAT was introduced in Sweden in 1969 often asserted that although an agreement on commission trading would not exist between a middleman and his mandator the special rule in question is expanding what is meant with commissioner for VAT purposes to comprise not only commissioners in an ordinary sense, but also representatives *comparable* with those. Such a special 'VAT commission rule' shall thereby have been deemed meaning that also representatives *comparable* with commissioners would be comprised by general VAT rules like what applies to an ordinary retailer, instead of the person in question being deemed an ordinary agent, only because the representative receives the payment from the customer *and* omits to, in the invoice to that person, identify the mandator. The SKV refers in a standpoint of 2020-09-25 to the preparatory works, namely to the mentioned prop. 1993/94:99 (p. 190), regarding Ch. 6 sec. 7 of the GML, but without mentioning that the legislator stated there that the words *for example* from item 3 of the instructions to sec. 2 of the VAT Act of 1968 were not transferred to that rule because the exemplification was considered *unnecessary*.[222]

In the government's official report on a structural overview of the VAT legislation in Sweden, SOU 2020:31 (*En ny mervärdesskattelag* – A new VAT act), the special rule in question was not mentioned. I gave my viewpoints on that report in the JFT,[223] and note in Forssén 2024d, that in SOU 2020:31, which came in June 2020, it was suggested that Ch. 6 sec. 7 would get an exact correspondence in the new VAT act. It was first in the proposal of 17 February, 2022 made to the Council on Legislation for consideration that the legislator abandoned that solution and instead emphasized advantages with the directive's rules in Articles 14(2)(c) and 28 on transfer of goods and taking part in supply of services given more clear correspondences in the NML (i.e. in the new VAT act – the ML). The legislator considered that it strengthened the adjustment of the VAT act to the structure and wording of the VAT Directive,[224] why Ch. 5 sec. 3 second para no. 3 and sec. 27, which in principle corresponds

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mervärdesskattelagen ('VAT carrousels' and the alteration of the special intermediation rule by the new VAT act), DJ (*Debatt*/Debate), published 2024-05-16, at 11.56, on www.dagensjuridik.se.

[220] See prop. 1993/94:99 (*Ny mervärdesskattelag* – New VAT act), p. 190. See also SOU 2002:74 (*Mervärdesskatt i ett EG-rättsligt perspektiv* – VAT in an EU-law perspective) Part 1, p. 653 and Forssén 2019a, section 11 222 000. Ch. 6 sec. 7 of the GML is also mentioned in sections 12 201 030–12 201 033, 12 213 130, 12 214 001, 12 216 120, 12 216 422 and 12 216 511 in Forssén 2019a.

[221] See *SKV:s Handledning för mervärdesskatt 2013* (the SKV's handbook for VAT 2013) Part 1 (*SKV 553 utgåva 24*), p. 329.

[222] See *SKV:s ställningstagande* (the SKV's standpoint) of 2020-09-25, *Förmedling av tjänster i eget eller i annans namn, mervärdesskatt* (Intermediation of services in one's own or in another person's name), dnr 8-314934, section 3.2. See https://www4.skatteverket.se/rattsligvagledning/384806.html?date=2020-09-25.

[223] See Forssén 2020a. See also: "*'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), Forssén 2024d (*ANNEX 5*), where I follow up Forssén 2020a with regard to Ch. 6 sec. 7 of the GML.

[224] See the government's proposal of 17 February, 2022 made to the Council on Legislation for consideration, pp. 230 and 231 (see www.regeringen.se).

with Article 14(2)(c) and Article 28 of the VAT Directive, were introduced in the ML by the VAT reform of 2023.[225] However, in my opinion should this have been done already at Sweden's EU-accession in 1995, since the predecessors to the two directive rules had on the whole the same wordings in the Sixth VAT Directive as in the VAT Directive, which replaced the Sixth VAT Directive on 1 January, 2007.[226]

One thing that makes it unclear whether the SKV also after the VAT reform of 2023 considers that such a special 'VAT commission rule' exists in Swedish VAT law as the SKV and its predecessor the RSV asserted is the following. The SKV has in the standpoint of 2020-09-25 made an amendment, "*Nytt: 2023-05-31*", i.e. New: 2023-05-31, where the SKV notes that *a new VAT act comes into force on 1 July, 2023*, which means that *certain concepts in the standpoint are out of date*, but that *the SKV's conception is that the legal judgment remains why the standpoint shall remain*. Therefore, the question is whether the SKV puts forward that standpoint and at the same time regards that the legislator in the proposal of 17 February, 2022 made to the Council on Legislation for consideration abandoned the viewpoint in SOU 2020:31 meaning that Ch. 6 sec. 7 of the GML would get an exact correspondence in the new VAT act.

In the light of the review in the nearest previous section, I state that the implementation of the two mandatory rules of the VAT Directive, Articles 14(2)(c) and 28, into Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML means that the SKV cannot assert anymore that a special 'VAT commission rule' exists according to current law in the way that the SKV has claimed. By the VAT reform of 2023, it is in my opinion clarified that such a special rule with respect of VAT does not exist anymore. In other words, there is no what I call a 'rubber rule' meaning that itself causes an ordinary agent to be deemed tax liable (nowadays liable of payment) for the whole sales price to a customer instead of only for the commission that the person in question receives from the mandator. In my opinion, it may be considered clarified that that consequence cannot occur after the VAT reform of 2023, only because the representative has received the payment from the customer *and* has issued the invoice in his own name. I may also mention that a special rule can no longer be deemed existing that expands commission trading to comprise also ordinary private persons, as I have stated that Ch. 6 sec. 7 of the GML did.[227] It depends on that in the ML it is stated in Ch. 16 who is liable of payment, and in which other chapters in the ML that rules thereon exist, whereas which transactions are taxable is stated in Ch. 5 of the ML. In that way, a division into two parts has been introduced by the ML of the determination of the tax subject and the tax object respectively, instead of as in Ch. 1 sec. 2 sixth para of the GML expanding the concept tax

[225] See section 1.

[226] See the Swedish language translation of the Sixth VAT Directive, where Article 5(4)(c) and Article 6(4) respectively had the following wordings: "4. The following shall also be considered supplies within the meaning of paragraph 1: (c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale." and "Where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he shall be considered to have received and supplied those services himself." I especially note the similarity between the Sixth VAT Directive and the Swedish language version of the VAT Directive, by the correspondence to "*i eget namn*" ('in own name' – note that I have made this translation into Eng. word by word), i.e. "*i sitt eget namn*" (Eng. language version – according to above – "in his own name"), only existing regarding services also in the Sixth VAT Directive.

[227] See Björn Forssén, Law and Language on The Making of Tax Laws and Words and context – with Legal Semiotics: Fourth edition, section 2.2 (The special rule on tax liability for intermediary services – Ch. 6 sec. 7 of the GML). Self-published 2019 (Forssén 2019c).

liable with *special rules on who is tax liable in certain cases*, which were to be found in Ch. 6, Ch. 9 and Ch. 9(c) with the present special rule in Ch. 6, i.e. sec. 7 in Ch. 6 of the GML.[228] That is not decisive for the questions I am bringing up in this article, but, for the context, I thus mention that it may also be considered as clarified by the VAT reform of 2023 that middlemen – like retailers – must have the character of taxable persons to be comprised by the VAT.

Although preparatory works is a law source that should be regarded, shall legislation not be made through the preparatory works. That conflicts with the constitutional principle of legality for taxation measures.[229] The SKV's conception that a special 'VAT commission rule' existed based on the preparatory works in older Swedish VAT law is in my opinion broken by the VAT reform of 2023. If this was the case, it has also since Sweden's EU-accession on 1 January, 1995 existed a breach of the EU law by Sweden due to the mandatory directive rules, that is Articles 14(2)(c) and 28 of the VAT Directive and Articles 5(4)(c) and 6(4) of, the predecessor, the Sixth VAT Directive respectively, not being correctly implemented in the Swedish VAT legislation. That conflicts with the EU law insofar that it is binding for the EU Member States to implement directives into the national legislation, which follows of Article 288 third para of the TFEU, and that in the present respect is a matter concerning mandatory rules in the VAT Directive and in the predecessor the Sixth VAT Directive respectively.

Thus, in my opinion cannot the SKV continue also after the VAT reform of 2023 with asserting that an actual current law exists based on preparatory works, when it must be considered clarified by the ML that any special 'VAT commission rule' does not exist in the Swedish VAT legislation which in itself would expand the middleman's liability of payment in the way that the SKV has asserted – if this has been the case at all. In my opinion, the question could have been tried a long time ago based on current law in a true sense by the HFD if it was not for the request since 1972 of leave to appeal for such a trial to take place.[230] If a trial in the HFD in a tax case regarding the scope of Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML would lead to a deviation from what follows in that respect of Article 14(2)(c) or 28 of the VAT Directive, it would mean a development of a parallel case-law in Sweden compared with other EU Member States which are not considering that a special

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[228] See section 1, where I in a note express the wording of Ch. 1 sec. 2 sixth para of the GML.

[229] Compare the principle no tax without an act (*nullum tributumj sine lege*), which is expressed by the principle of legality for taxation measures according to Ch. 8 sec. 2 first para no. 2 of the RF.

[230] *Förvaltningsprocesslagen (1971:291)*, the Administration Procedural Act, abbreviated FPL, came into force on 1 January, 1972. That leave to appeal is required in the HFD follows of sec. 35 of the FPL. See also p. 19 in the government's bill no. 30 of 1971 to the parliament with proposal for an act on general administrative courts, etc.; given Stockholm Palace on 12 March, 1971. Regarding my use of the expression *faktisk gällande rätt* ('actual current law'): See Forssén, Björn, *Styrelseproffs med flera och F-skatten – faran med utveckling av en faktisk gällande rätt vid sidan av gällande rätt i en egentlig mening* (Professional board members and others and the F-tax – the danger of a development of an actual current law beside current law in a true sense). Balans 5/2017 pp. 20–23 (published 2017-11-26 on www.tidningenbalans.se). (Forssén 2017b). See, in the same respect, *Ord och kontext i EU-skatterätten – En analys av svensk moms i ett law and language-perspektiv* (Words and context in the EU tax law – An analysis of Swedish VAT in a law and language-perspective): Third edition, section 1.4 (*Språkliga frågor* – Language questions). Self-published 2019 (Forssén 2019d). There I state that with actual current law and current law in a true sense respectively, I argue for that an actual current law may exist at the SKV or at the lower administrative courts (Sw., *förvaltningsrätterna* and *kammarrätterna*), i.e. an actual current law which has not been expressed in current law in a true sense in the form of case-law from the HFD or the CJEU.

'VAT commission rule' exists in pursuance of what the SKV has claimed. It is undesired in the light of the harmonisation demand on the national legislations of the Member States regarding indirect taxes and that distortion of the competition on the internal market shall be counteracted by the Member States working against competition distortion depending on the tax according to Article 113 of the TFEU and in the light of the principle of a neutral VAT also following by recital 4 in the preamble to the VAT Directive and Article 1(2) of the directive. Therefore, it shall be interesting to follow whether the SKV completes its standpoint of 2020-09-25 in the present respect or continues to state its perception about the existence of the special rule in question according to Swedish VAT law.

By the way, it may be mentioned that there is a rule on sales of goods or services on behalf of a producer in Ch. 5 sec. 39 first para of the ML. It only means that the rules in Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML *applies even if a production enterprise sells goods or services by auction on behalf of a producer*. In the same way a reference was made for such cases in Ch. 6 sec. 8 first para to Ch. 6 sec. 7 of the GML. Therefore, I mention in this article only Ch. 6 sec. 7 of the GML and first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968 and Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML respectively, when I problemize what the adjustment to Articles 14(2)(c) and 28 of the VAT Directive means for the – again based on my own professional experience – two main issues concerning VAT situations for middlemen on the theme of commission trading or not that I bring up in this article.

3 A certain comparison with the Finnish and Danish VAT acts concerning the existence of a special 'VAT commission rule' according to older Swedish VAT law

Especially for the problemizing in this article of that the special rule on intermediation in Ch. 6 sec. 7 of the GML has been adjusted in the ML, by Ch. 5 sec. 3 second para no. 3 and sec. 27, to Article 14(2)(c) and Article 27 of the VAT Directive I make a certain comparison with the Finnish VAT act, *mervärdesskattelag 30.12.1993/1501*, abbreviated FML, and the Danish VAT Act, *momsloven*,[231] abbreviated DML.

What is commission trading according to the FML follows of sec. 19 of the FML, which has the following wording (in my translation):

> *When goods or services are sold in a representative's name on behalf of the mandator the representative is deemed to have sold the goods or the services to the purchaser and the mandator to have sold those to the representative.*
>
> *When goods or services are purchased in a representative's name on behalf of the mandator the representative is deemed to have sold the goods or the services to the mandator and the vendor to have sold those to the representative.*

Thus, sec. 19 of the FML has a wording that lies close to Ch. 6 sec. 7 of the GML. However, in my opinion the two rules are not directly corresponding to each other. What distinguish those from each other is in the first place that sec. 19 of the FML is lacking such a writing concerning whether the middleman receives the payment from the customer which were to be

[231] See *Bekendtgørelse af lov om merværdiafgift (momsloven)*, Announcement of the VAT act (*momsloven* – the VAT act), LBK nr 1021 af 26/09/2019 *Skatteministeriet* (the Treasury). See https://www.retsinformation.dk/eli/lta/2019/1021.

found in Ch. 6 sec. 7 of the GML. For comparison, I note the following from the Finnish tax authority's, *Skatteförvaltningens*, instruction (*anvisning*), *Momsbeskattning av kommissionshandel och förmedlingsverksamhet* (VAT taxation of commission trading and intermediation activity).[232]

In section 1 of its instruction the tax authority states that it in general applies at VAT taxation to distinguish commissioners from ordinary intermediaries (agents), when a representative is hired at sales or purchases of goods or services. According to the tax authority, it is first a matter of examining whether the representative is acting in his own name, that is whether the representative (the middleman) is functioning as commissioner or if the representative is taking part in the mandator's name, that is as an agent. The tax authority states that if the representative is deemed selling goods or services to a customer *in his own name*, he shall pay VAT on the whole of the price that the customer has paid for the goods or the services, whereas a representative who has the function of an agent, that is acting in the name of another (the mandator), pays in his turn only VAT on his commission.

In section 2 of the instruction (*Kommissionshandel eller försäljning av tjänster?*), Commission trading or sale of services? the tax authority states that for a correct VAT treatment of a middleman situation it must first be examined whether the transactions between the representative and the mandator is about *commission trading or sale of an intermediation service or some other service*. In that respect, it is according to the tax authority especially important *in whose name the goods or services are sold to the customer*. It is also important what the customer's perception is about from who he regards that he is purchasing the goods or services, whereby marketing and other information put forward is regarded. Unclear situations shall be decided by judging the totality of facts, whereby the tax authority considers that for the judgment it is not relevant what denotation is used for the representative's fee (intermediation fee or commission). According to the tax authority, it is nor of importance for the VAT taxation how the fee is charged, that is whether the representative is taking out his fee separately or deducts it at the accounting to the mandator. In section 2.1 (*Definition av kommissionshandel*), Definition of commission trading, the tax authority states inter alia that commission trading means that the representative is acting in his own name, but on behalf of the mandator, whereby the VAT taxation at commission trading is considered equal with retail. According to the tax authority, then two following sales are considered occurring: 1) the mandator's sale to the representative and 2) the representative's sale to the customer. The tax authority considers that the commissioner in the corresponding way also can function as the representative of the customer, which follows of sec. 19 second para of the FML.

According to what the tax authority moreover states in section 2.1 of its instruction, it may occur that the terms intermediation service or intermediation fee are used in the agreements between the parties, despite that it de facto is a matter of commission trading with respect of VAT. Such an unclear situation concerning the question whether the middleman (the representative) is acting *in his own name*, whereby commission trading exists, or if he is acting in the goods deliverer's or the service supplier's, that is the mandator's, name, whereby an ordinary mediation service is supplied by the middleman, shall according to the tax authority be judged *setting out from the content of the agreements and other circumstances*. The judgment is always made as a totality, and the tax authority states examples of signs on commission trading occurring according to sec. 19 of the FML, whereby the tax authority

[232] See *Skatteförvaltningens*, the tax authority's, instructions on 1 January, 2023, dnr VH/4840/00.01.00/2022, on www.vero.fi.

states that all signs must not be fulfilled for commission trading to exist. The signs stated are the following, namely:

- that a certificate of sale or an order confirmation or another confirmation has been written in the representative's name,
- that the customer considers that he based on marketing and other information put forward purchase goods or services from the representative,
- that flaws in goods or services are reported to the representative,
- that sales have been organized by someone else than the deliverer of goods or supplier of services, that is by someone else than the mandator, and
- that the deliverer of goods or supplier of services (the mandator) does not alone decide the sales price on goods and services, but together with the representative.[233]

Thus, among the signs of commission trading are not to be found the circumstance how the representative takes out his fee, separately or by deduction at the accounting to the mandator, which circumstance the tax authority, as mentioned, also expressly mention in its instruction to lack importance for the judgment whether commission trading or ordinary mediation existing with respect of VAT. This confirms my opinion that what is in the first place distinguishing Ch. 6 sec. 7 of the GML and sec. 19 of the FML from each other is that it for commission trading is lacking a writing in sec. 19 of the FML regarding whether the representative is receiving the payment from the customer. By the way, it is expressly stipulated in sec. 19 of the FML first and second paras that commission trading can regard either a representative's sale or purchase for a mandator, but in my opinion it does not make any difference on a point of substance in that respect compared with Ch. 6 sec. 7 of the GML or Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML.

Thus, I consider that the FML is lacking a direct correspondence to Ch. 6 sec. 7 of the GML. Without having made an empirical examination by an inquiry to tax authorities and treasuries in other Member States, the character of 'rubber rule' that the SKV has given the special rule in older Swedish VAT law was, as far as my experience goes, unique for Sweden. I refer in that respect to the FML and to the DML, where it (in my translation) is stated in sec. 4 third para no. 1 concerning *deliveries of goods and services* that in that respect is *furthermore* meant *transfer of goods according to a commission agreement regarding purchase or* sale. To compare a middleman with a retailer concerning goods is thus a commission trading agreement required. In the same rule it is stipulated in the fourth para concerning services: *When an intermediary of a service is acting in his own name, but on behalf of another, the intermediary himself is deemed to have received and delivered the service in question*. Like with the FML, also Danish VAT legislation is lacking anything about the payment itself being regarded to decide the status of the middleman with respect of VAT.

That the circumstance that the middleman receives the payment from the customer is not to be found as a criterion in the present respect in the ML after the adjustment to Article 14(2)(c) and Article 28 of the VAT Directive, by Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML having replaced Ch. 6 sec. 7 of the GML, means thus in my opinion the following. According to current Swedish VAT law, it is clarified that it is no longer possible to expand the scope of the tax assessment basis for VAT for the middleman, so that he is compared at the VAT taxation with a retailer of the mandator's goods or services, only because the middleman

[233] See *Skatteförvaltningens*, the tax authority's, instructions dnr VH/4840/00.01.00/2022, section 2.1.

receives the payment from the customer *and* omits to, in the invoice to that person, identify the mandator.

Although it, as above-mentioned,[234] is unclear whether the SKV also after the VAT reform 2023 considers that there is a special 'VAT commission rule' in Swedish VAT law as the SKV and the predecessor the RSV have asserted, I consider that the SKV's standpoint of 2020-09-25 does not contain anything supporting SKV to continue to claim the standpoint about the existence of the special rule. Instead, the SKV is stating, for the judgment of whether the intermediary of a service appears as the counterpart of the purchaser, on the whole the same circumstances as signs of this being the case as the Finnish tax authority (*Skatteförvaltningen*) is stating in its instruction as signs of the existence of commission trading. The SKV presents the following list of circumstances which the SKV consider as constituting signs of the intermediary appearing as the purchaser's counterpart, namely:

- that the agreement, the booking confirmation, the receipt, or similar documents contains the representative's name and are written in a way that the representative appears as the purchaser's counterpart,
- that the marketing of the service contains the representatives name and is worked out in a way that the representative appears as the purchase's counterpart,
- that the intermediary shall compensate the purchaser if the service has not been carried out as agreed, whereby it does not matter that the intermediary in his turn has the right of recourse against the seller of the service,
- that the intermediary, according to terms of the agreement, allocation of responsibility and practical arrangements, appears as responsible for the supply of the service, and
- that the intermediary has the financial responsibility in relation to the purchaser if the service is sold on credit.

The SKV states that it is a matter of an assembled judgment of all circumstances in each individual case, but that the list according to above of signs on the intermediary appearing as the purchaser's counterpart is not exhaustive.[235] This also corresponds with the Finnish tax authority's perception that the judgment of signs on the existence of commission trading shall be made by judging the totality of facts, whereby the tax authority states that the signs mentioned are only examples of that it is matter of such trading.

By the way, I may mention for the context that in the FML and the DML respectively there are to be found corresponding rules about travel agents to Ch. 9(b) of the ML – nowadays – Ch. 19 of the ML – concerning travel agents and PMT, where *in his own name* is used concerning travel services. Compare sec. 80 first para of the FML concerning the determination of travel services and special scheme for travel agents in sec. 67 first para of the DML. Those rules correspond with the special scheme for travel agents in Ch. 19 of the ML, where it of sec. 2 first para no. 2 follows that a travel agency is comprised by the PMT-rules at supply of travels to travellers *if the travel agency as a part of that supply 1. acquires goods and services from other taxable persons, or 2. mediate goods and services in its own name on their behalf*. Thus, I conclude that the special scheme for travel agents according to Articles 306–310 of the VAT Directive has been implemented in the VAT legislations of the three Nordic Member States of the EU, and that the concept "*i eget namn*" and "*i eget navn*"

[234] See section 2.

[235] See the SKV's standpoint of 2020-09-25, dnr 8-314934, section 4.1.2.

respectively, in Article 306(1) first para of the directive's language versions in Swedish and Danish respectively (Note Eng. language version, "in their own name"), thereby have been implemented in those national legislations in the field of VAT.

4 At commission trading the middleman can also supply a special intermediation service to the mandator

Intermediation is a concept which is not defined in the VAT Directive, and it was neither in the GML.[236] Also in the nowadays applying ML a definition of the concept intermediation is lacking.[237] However, intermediation has been comprised by the general taxation of transaction of goods and services ever since the reform of the GML on 1 January, 1991 by SFS 1990:576. That meant an adjustment to the Sixth VAT Directive, which was one of the predecessors to the VAT Directive. In the same way as in the VAT Directive, exemption from taxation for intermediation services apply only if it is expressly stipulated in the ML, like regarding bank and financial services, trading of securities and insurance services.[238] For example an estate agent thus carries out a taxable transaction, despite that the underlying transaction regarding the real estate is not taxable. If an express exemption is lacking for an intermediation service, this means according to the preparatory works to the reform of 1991 that a broker's service is comprised by taxation even if he is *only bringing together vendor and purchaser* of the object in question.[239]

That a middleman in his own name sold goods or services for the mandator meant according to Ch. 6 sec. 7 of the GML that he made the same transaction as the mandator regarding the underlying goods or services. However, it also meant, in pursuance of the rule on general taxation for transactions of goods and services in Ch. 3 sec. 1 first para of the GML (nowadays Ch. 10 sec. 2 of the ML), that the middleman furthermore provided the mandator a taxable intermediation service. However, in practice that question often disappeared, by the middleman making his mark-up in the pricing of the underlying goods or services and then did not take out any separate commission for the intermediation service itself.[240]

In the last-mentioned respect, I refer to a case at the HFD, RÅ 2002 ref. 113, where the question concerned the time before 1 July, 1994, i.e. before the GML came into force and thus the VAT Act of 1968 applied. However, the HFD mentioned both Ch. 6 sec. 7 of the GML and the predecessor, item 3 of the instructions to sec. 2 of the VAT Act of 1968. In the case, the HFD considered that a limited company (Sw., *aktiebolag*), which in its own name had sold subscriptions on general newspapers and foreign periodical publications, which were exempted from taxation according to the then sec. 8 first para no. 9 and 10 respectively of the VAT Act of 1968, had not supplied any taxable intermediation services. The HFD found,

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[236] See the government's proposal of 17 February, 2022 made to the Council on Legislation for consideration, p. 196.

[237] See Ch. 2 of the ML (*Definitioner och förklaringar*), Definitions and explanations.

[238] See Ch. 10 sec. 33 of the ML, Ch. 3 sec. 9 of the GML and Article 135(1)(d)–(f) of the VAT Directive and Ch. 10 sec. 32 of the ML, Ch. 3 sec. 10 of the GML and Article 135(1)(a) of the VAT Directive respectively.

[239] See prop. 1989/90:111 (*Reformerad mervärdeskatt m.m.*), Reformed VAT etc., p. 106. See also Forssén 2019a, section 12 212 130.

[240] See Forssén 2019a, section 12 216 511, example 3.

based on what had been found out in the lower instances, that it could not be deemed clarified against the company's denial that it at the sales of the subscriptions would have acted as representative for the publishers according to item 3 of the instructions to sec. 2 of the VAT Act of 1968 and thereby received commission for the services. The HFD considered that the examination rather proved that it had been a matter of an independent resale of the periodicals, that is of the goods. Thus, the HFD stated that there was no reason to deem the company's supply as two transactions, why the company, besides the actual sales of the goods, was not deemed having supplied any intermediation services that are taxable (why the HFD approved the company's appeal).[241]

In this context, I come back here to the Finnish tax authority in its instruction regarding commission trading stating that such trading means that the representative is acting in his own name, but on behalf of the mandator, whereby the VAT taxation is considered comparable with resale so that two sales are considered occurring: 1) the mandator's sale to the representative and 2) the representative's sale to the customer.[242] However, that does not exclude that also a special intermediation service may occur that the representative is making for the mandator according to general VAT rules. If the company in RÅ 2002 ref. 113 had taken out a commission for mediation, it would in my opinion have meant that it was not only a matter of an independent resale according to general VAT rules, but also an intermediation service that the company carried out as an agent to the mandator according to such rules.

Thus, in my opinion a representative (an agent) can provide an intermediation service to a mandator, whereas a representative who is deemed acting as a commissioner is considered comparable with a retailer. However, a middleman who acts as a commissioner can at the same time supply a special intermediation service to the mandator. For middleman questions on VAT the VAT reform of 2023 means in my opinion only that the prerequisite previously put up for 'VAT commission' meaning that the representative receives the payment from the customer has been abolished from the ML, by Ch. 5 sec. 3 second para no. 3 and sec. 27 therein having replaced Ch. 6 sec. 7 of the GML. I deem that adjustment to Article 14(2)(c) and Article 28 of the VAT Directive meaning that the fixing of a border in pursuance of the ML between an agent relationship and commission trading also is complying in principle with what follows in that respect according to the FML and the DML.

5 Background to the choice of carrousel trading to problemize the question about a special 'VAT commission rule'

In the introduction of one of my previous articles in the JFT, I name carrousel trading a phenomenon.[243] It depends on the lack of an unequivocal definition of such VAT frauds, but many different versions of VAT frauds by carrousel trading. However, I stated that there is a common denominator for the phenomenon, namely that frivolous enterprises take measures

[241] See Forssén 2019a, section 12 216 511, example 3, where I also state that it under *Litteratur*, Literature, in RÅ 2002 ref. 113 was referred to: prop. 1968:100, pp. 115 and 121; prop. 1968:137 [the government's bill to the parliament with proposal for a regulation on alteration of the regulation of 6 June, 1968 (no. 430) about VAT], pp. 20 and 21; prop. 1989/90:111, pp. 106 and 190; prop. 1993/94:99, p. 190; and prop. 1994/95:202, *Mervärdesskatten på omsättning av begagnade varor, m.m.* (The VAT on transaction of second-hand goods, etc.), pp. 61–62.

[242] See section avsnitt 3.

[243] See Forssén 2023c.

with their VAT returns so that the State in the end loses money. This by the VAT on goods or services in an ennobling chain of enterprises not being passed on to a consumer as tax carrier. It conflicts with the EU law in the field of VAT, since the phenomenon thereby already is in conflict with the VAT principle according to Article 1(2) of the VAT Directive. Of that article follows 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 transactions take place in the production and distribution process before the stage at which the tax is charged",[244] and that "the common system of VAT shall be applied up to and including the retail trade stage".[245]

Thus, frauds against the State by 'VAT carrousels' are similar to other VAT frauds which means a conscious application of the VAT law in conflict with the mentioned basic criteria of the VAT principle. After Forssén 2023c, I wrote in the JFT about the Swedish VAT reform in Forssén 2024c. In section 6 therein, I mentioned the alteration of the 'VAT commission rule'. That rule can come up in connection with 'VAT carrousels' and then will matters and cases on that theme become more matters of legal interpretation, by the question whether a correct basis of the taxable amount for VAT has been accounted for coming up both for the mandator and the middleman in a commissioner's relationship. Thereby, questions about composite transactions are added to the context, which I have mentioned earlier.[246] Before I am going through this rather complex question in the nearest following section, I give a background to what – besides Forssén 2020c and Forssén 2020d – has led me to my choice of carrousel trading to problemize the question about a special 'VAT commission rule'. Therefore, I conclude this section by mentioning some of my previous efforts to show the level of complexity in connection with interpretation and application of rules concerning the 'VAT carrousels'. In this way, I emphasize the great economical question for the State as well as for the enterprises which lies in finding out whether the 'VAT commission rule' nowadays can be considered as abolished from the Swedish VAT law. In my experience, the 'VAT commission rule' tends to occur rather arbitrarily in for example matters on 'VAT carrousels' and then especially in cases of composite transactions.

In the introduction of Forssén 2023c, I stated that the inspiration to that article came to a certain extent partly from a course I gave in Stockholm (on 2022-11-30) with the title *Momsbedrägerier genom karusellhandel* (VAT frauds by carrousel trading), where inter alia Forssén 2022a was included, partly from the also included lecture that I gave on the topic already on 14 November, 2001 (i.e. Forssén 2001). Furthermore, I mentioned that I also set out from an article of mine published on 2023-06-13 in the Balans.

The inspiration to the present article comes of course also from my mentioned deepening in the topic, and above all from that I before the lectures and seminars in 2024 that I have held every year since 2015 on The Master's programme in European Legal Studies at Södertörn

[244] See Article 1(2) first para of the VAT Directive.

[245] See Article 1(2) third para of the VAT Directive.

[246] See Björn Forssén, *Sammansatta transaktioner och semiotik beträffande moms* (Composite transactions and semiotics regarding VAT), SST 2020 pp. 160–172 (Forssén 2020c) and Björn Forssén, *Vara och tjänst vid sammansatta transaktioner – tolkning och tillämpning enligt mervärdesskattelagen och EU:s mervärdesskattedirektiv* (Goods and services at composite transactions – interpretation and application according to the Swedish VAT Act and the EU's VAT Directive), self-published 2020 (Forssén 2020d). In 2022, I translated Forssén 2020d into English with the title mentioned. (Forssén 2022b).

University (Stockholm) prepared a material for the students, which, concerning the item VAT frauds by carrousel trading inter alia consists of Forssén 2022a, Forssén 2023c, Forssén 2023a, Forssén 2024d and another article that I am mentioning in the present article.[247] I have put together that material and some other of my writings in a book which in 2024 was laid out on the study web at Södertörn University.[248] I have also been inspired to write the present article due to the Swedish Bar Association in June 2024 appointing me as author in a work group that made a draft of reply with considerations to the Treasury on the final report from *Utredningen om åtgärder för att förhindra mervärdesskattebedrägerier* (The investigation about measures to prevent VAT frauds).[249]

In Forssén 2023c, I presented my perception about the experiences in Sweden of the phenomenon with frauds regarding VAT by carrousel trading in relation to the EU law – concerning above all the VAT legislation, the civil law accounting law and tax fraud according to sec. 2 of the Tax Fraud Act, i.e. the SBL. In Forssén 2023c, I mention in the introduction also that VAT frauds by carrousel trading is a big problem for the Swedish state and that it has escalated the last couple of decades and is usually described as Sweden's and the EU's largest VAT fraud. In this article, I thus follow up inter alia my articles in the JFT in Forssén 2023c and Forssén 2024c, and problemize regarding middleman situations especially the question from Forssén 2024d concerning the treatment with respect of VAT, in the SKV's and the EBM's investigations of carrousel trading, of licences for operating systems in electronical products like computers and mobile phones. That question is, as far as my experience goes, usually not mentioned in itself in such investigations, but should especially on the theme of composite transactions be given special attention in relation to Ch. 6 sec. 7 of the GML, whereby I iterate from Forssén 2024d that I at the mentioned lecture on Swedish Law Meeting (Forssén 2001) stated that Ch. 6 sec. 7 constituted a question in connection with the 'VAT carrousels' (whereby I inter alia referred to the above-mentioned prop 1968:100 p. 121).[250]

6 The question about carrousel trading and composite transactions consisting of electronical products constituting goods and licences for the operating systems

As far as my experience goes, the SKV and the EBM do not mention in their investigations concerning VAT frauds by carrousel trading any other tax assessment basis for VAT than the

[247] See Forssén 2024a. In Forssén 2024a, I mention the partly report that the investigation *Åtgärder för att förhindra mervärdesskattebedrägerier* (Fi 2022:11), Measures to prevent VAT frauds, gave on 31 August, 2023, i.e. *Skyddet för EU:s finansiella intressen. Ändringar och kompletteringar i svensk rätt* (SOU 2023:49), The Protection of the EU's financial interests Alterations and completions in Swedish law (SOU 2023:49).

[248] See Björn Forssén, *"Momskaruseller" samt näringspenningtvätt, m.m.* ("VAT carrousels" and commercial money laundering, etc.). Self-published 2024 (Forssén 2024e). In 2024, I translated Forssén 2024e into English with the title mentioned. (Forssén 2024f). *This book is the second edition of Forssén 2024f.*

[249] The investigation about measures to prevent VAT frauds (Fi 2022:11) gave on 2 May, 2024 its final report *Åtgärder mot mervärdesskattebedrägerier* (SOU 2024:32), Measures against VAT frauds (SOU 2024:32). On 31 May, 2024 *Sveriges advokatsamfund* (the Swedish Bar Association) was invited by the Treasury to at the latest on 15 November, 2024 give its considerations on SOU 2024:32. The Bar Association gave its considerations to the Treasury on 2024-11-15 and those interested can take part of the answer on the Bar Association's website (https://www.advokatsamfundet.se/). See also www.forssen.com, where my translation into English of the answer is to be found under *Forskning/F13*.

[250] See p. 7 in my lecture memo to Forssén 2001 – available on https://www.forssen.com/forskning/f13/.

trader's. The investigations often concern trading with electronical products, like computers and mobile phones. However, the SKV or the EBM do not treat whether the State is losing VAT revenues as a result of VAT not being accounted for by the big international enterprises which own the software in such products.

In Joined Cases C-131/13, C-163/13 and C-164/13 (Schoenimport "Italmoda" Mariano Previti),[251] the Advocate General inter alia mentioned in the Opinion for a judgment to the CJEU:[252] *missing trader* is a matter of carrousel trading where the fraud quite simply consists of a trader disappearing, hence the expression *missing trader*. Moreover, the Advocate General stated that a receiver of an invoice makes a deduction for charged input tax, but any output tax is not accounted for by the vendor, or it is made at a low amount and for example the goods in question are put into circulation again, which is called "carousel fraud".[253]

In the Opinion, the Advocate General is stating that various types of goods can be used at VAT fraud by carrousel trading. However, the fraudsters often prefer goods like computer components or mobile phones, since those have a high unit value and are easy to transport (note that in the Swedish language version the Advocate General mentions '*datorer eller mobiltelefoner*', i.e. computers or mobile phones). The Advocate General moreover states that this type of fraud is not a matter of a 'normal' supply chain, but of activities organized solely in order to commit tax fraud. It is a matter of business transactions which in that way means that VAT is evaded, and the profit made by the fraudsters comes from the fraud itself and not from the profit margin. However, the Advocate General also states that "in some cases, normal undertakings are used as links in the supply chain, of their own free will or without their knowledge", and that "some traders in the supply chain may not even be aware that they are participating in a fraud and may be acting in good faith. It is only the missing trader who commits fraud per se by failing to pay the tax due to the tax authorities". The Advocate General admits that the VAT system is "fairly complex", but that the complete neutrality of taxation with the system constitutes benefits, whereas "the other side of the coin is that the complexity of the system makes it easier to perpetrate fraud using its own mechanisms".[254]

The software that so to speak lies hidden in an electronical product like a computer, or a mobile phone is constituted of an operating system. It is not the property of the trader who is selling the goods in question, that is the computer or the mobile phone, but of another enterprise on the market for such products, which often is a big international enterprise that owns the licence for the operating system also after the consumer has purchased the computer or the mobile phone from the trader, that is usually from a retailer with an ordinary shop for electronical products. Thus, the sale of a computer is not only of importance for the transaction of the goods in question, but each computer comprises an OEM-licence and normally the supply of it shall be treated by itself with respect of VAT – as a supply of services.[255] The same applies to operating systems in mobile phones.

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[251] ECLI:EU:C:2014:2455.

[252] ECLI:EU:C:2014:2217.

[253] See items 32–34 of the Advocate General's Opinion in Joined Cases C-131/13, C-163/13 och C-164/13.

[254] See items 31–37 of the Advocate General's Opinion in Joined Cases C-131/13, C-163/13 och C-164/13.

[255] OEM, *Original Equipment Manufacturer*.

Thus, the SKV and the EBM should in my opinion regard in their investigations of 'VAT carrousels' also whether big international enterprises correctly account for VAT when the taxable amounts also regard licences for operating systems to for example computers or mobile phones. Before that question has been the subject of an empirical examination, it is in my opinion pointless to refer the State's loss of VAT revenues in asserted 'VAT carrousels' to wholesalers or retailers. To find a trader disappearing – a *missing trader* – I suggest that the SKV and the EBM in their investigations divide for instance a computer or a mobile phone into goods and services respectively, so that the sale that the wholesaler or the retailer is making is not deemed goods in itself, where the question about a tax assessment basis for VAT regarding the licence for the operating system is altogether left open by the SKV and the EBM.

To support my perception about the need of the fixing of a border between hardware and software regarding products like computers and mobile phones, I state the following from the preparatory works to the *produktansvarslagen (1992:18)*, i.e. the Swedish Product Liability Act, abbreviated PAL, where the following is stated regarding computers, where sec. 2 first para first sen. of the PAL is concerned and that therein is stipulated (in my translation) that *with products is in this act regarded chattels*. The legislator states concerning the construction of a computer and whether PAL is applicable to computers inter alia that the hardware's all parts are loose and thus products in the meaning of PAL, whereas the software constitutes a series of instructions which are not chattels but intellectual works which are not comprised by the concept product of PAL. If a damage is caused by a logical flaw in a computer program, the originator of the program will not be liable to pay damages according to the PAL, but the legislator considers that the originator's responsibility for damages occurred instead must be judged by other rules, last by *skadeståndslagen (1972:207)*, i.e. the Swedish Tort Liability Act. However, this does not rule out that a flaw in a computer program can give rise to product liability. Certain computer programs constitute necessary suppositions for a computer functioning at all, which is the case with the operating system that often is stored in the computer in a way making it inaccessible for the user. Also, purely application programs can constitute *firmware* and thereby be permanently built-in in the hardware. Programs of these sorts are included as integrated parts of the computer, and physically and technically there is no sharp line between the hardware and the software. If a computer with such built-in programs causes a damage, the manufacturer of the computer is liable for the damage according to the PAL, even if the explanation to the damage ultimately is a flaw in the computer's program. The legislator states in that respect that it for product liability is lacking importance what the substantial explanation is that a product causes a damage, since the responsibility instead is limited according to sec. 1 of the PAL by the provision that the damage shall be a consequence of security flaw.[256]

It is more than three decades since the PAL was introduced and electronical products has taken by itself developed a lot since then, which has contributed to the EU Commission presenting a proposal for a new product liability directive on 28 September, 2022.[257] The

[256] See prop. 1990/91:197 (*om produktskadelag*), about product liability act, pp. 93 and 94. See also Björn Forssén, *Produktansvar – introduktionsbok: Tredje upplagan* (Product liability – introduction book: Third edition), section 5.3.2 (Särskilt om datorer), Especially about computers. Self-published 2019 (Forssén 2019e).

[257] See the EU Commission's Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on liability for defective products, COM(2022) 495 final, which shall replace and thereby revoke the product liability directive of 1985 that is the basis for the PAL. The product liability directive's complete title is Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

ministry of justice noted in a fact memo regarding the proposal inter alia that the Commission at an evaluation of the product liability directive of 1985 – on which the PAL was based – concluded that that directive despite certain lacks is on the whole an efficient and relevant instrument.[258] Thus, in my opinion can still support be fetched from the legislator's statements concerning computers mentioned above in connection with the introduction of the PAL insofar as it from an economical point of view should be made a distinction between hardware and software in electronical products, which will lie as a basis to determine a taxable amount for VAT by on the one hand the trader (the wholesaler or the retailer) and on the other hand by the owner of the operating system. In pursuance of the CJEU's perception a division of a composite transaction may not be made in a way which is "artificial",[259] and in my opinion it should – from an economical perspective – instead appear as natural that he who own the operating system, and who thereby can take out royalty for the letting of it, also establish a tax assessment basis on which VAT is accounted for and paid to above all the tax authorities in the EU Member States where the consumers exist. Otherwise, a competition distortion will typically arise in conflict with the internal market according to the rule on unallowed state subsidies to enterprises in Article 107(1) of the TFEU. For Swedish circumstances, I consider that it is most important that these aspects are regarded in the SKV's and the EBM's investigations of asserted 'VAT carrousels', when 'the VAT carrousel rule', that is Ch. 6 sec. 7 of the GML, which thus has been invoked previously in such investigations by the SKV and the EBM nowadays has been adjusted to the EU law in the field of VAT, by the reform of 2023.

In the context, I may also mention that the reform made already on 1 July, 2021, by SFS 2020:1171, of the rules on special schemes for VAT on distance sales of goods and services, inter alia meant that the so-called third country scheme and the Union scheme, which previously applied to certain services (electronical services etc.), were extended to comprise all services. Those rules are nowadays to be found in Ch. 22 and Ch. 23 of the ML, and according to Ch. 22 sec. 8 first para of the ML it is voluntary to use a special scheme for the accounting and payment to the SKV, by a special VAT return being filed electronically to the SKV, instead of that this is done in an ordinary VAT return according to the SFL if the conditions for the special scheme are fulfilled. However, this does not mean that Sweden is losing the right of taxation of VAT regarding for example an American enterprise's letting of software like operating systems, when purchasers exist in Sweden, only because the enterprise chooses for instance Finland or Denmark as identification state and only point of contact (*One Stop Shop* – OSS), and accounts for and pays all VAT pertaining to actual transactions to the tax authority there, or vice versa. The VAT revenues paid shall in the same manner as with

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[258] See section 1.1 of *Regeringskansliet Faktapromemoria 2022/23:FPM7, Nytt direktiv om produktansvar. Publicerad den 1 november 2022* (the government office's fact memo 2022/23:FPM7, New directive on product liability of 1 November, 2022) – see https://www.regeringen.se/faktapromemoria/2022/11/202223fpm7/.

[259] See Case C-41/04 (Levob Verzekeringen and OV Bank), ECLI:EU:C:2005:649, item 30, where the CJEU stated that "where two or more elements or acts supplied by a taxable person to a customer, being a typical consumer, are so closely linked that they form objectively, from an economic point of view, a whole transaction, which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT".

ordinary VAT accounting go to the Member State which is the place of the supply of the service.[260]

7 The middleman and the question about profit margin taxation according to the special scheme for dealing with second-hand goods, works of art, collector's items and antiques

The other main issue, where it, as far as my experience goes, often has occurred that the SKV has invoked Ch. 6 sec. 7 of the GML as a special 'VAT commission rule' to the disadvantage for enterprises is the above-mentioned dealing with second-hand goods, works of art, collector's items, and antiques. Rules on PMT regarding such trading were to be found in Ch. 9(a) of the ML, and are nowadays, as mentioned above, to be found in Ch. 20 of the ML (*Särskild ordning för begagnade varor, konstverk, samlarföremål och antikviteter*), Special scheme for second-hand goods, works of art, collector's items and antiques.[261] The rules on that special scheme have their correspondences in Articles 311–343 of the VAT Directive.

Where the importance of that the ML – unlike what at least the SKV (and the EBM) stated concerning Ch. 6 sec. 7 of the GML as a special 'VAT commission rule' – it cannot anymore be deemed expanding what is meant by commission trading to apply to representatives who are *comparable* with, that is are similar to, commissioners, I first come back briefly to what I stated in section 6 of Forssén 2024c concerning PMT regarding dealing with second-hand goods, works of art, collector's items and antiques.[262]

If the SKV can carry through the standpoint that sales made by a retailer of second-hand goods, works of art, collector's items or antiques are not fulfilling the criteria of PMT, the consequences concerning the tax assessment basis are the following. Then, the retailer shall take out VAT on the whole sales price to customer according to general VAT rules, instead of the taxable amount constituting the profit margin itself at the sale to customer according to the PMT-rules. However, nowadays the SKV can in my opinion not invoke any special 'VAT commission rule' existing in the ML, to prevent the retailer from arguing for an agent relationship as an alternative to PMT or commission trading compared with ordinary retail.

Thus, in my opinion can the middleman as an intermediary nowadays invoke that an ordinary agent relationship exists as an alternative to PMT or commission as comparable with retail for VAT purposes, and that the taxable amount is the commission. Thereby the tax assessment basis will be equal to the commission. It constitutes the same amount as if PMT would be approved by the SKV, instead of the SKV carrying through that the taxable amount shall be deemed constituting the whole sales price received from customer. Thus, I consider that the SKV nowadays cannot disqualify an alternative argument for an ordinary agent relationship existing, since the ML does not contain any 'VAT commission rule' that with respect of VAT expands commissioner trading to apply also representatives similar to commissioners in a civil law meaning. In the same way as the Finnish tax authority states according to what I account for above the SKV (and the EBM) must in my opinion nowadays make a judgment

[260] See also Björn Forssén, *Momsreformen 1 juli 2023 – fokus på särskilda ordningar för moms* (The VAT reform on 1 July, 2023 – focus on special schemes for VAT). Balans 2023 pp. 1–11 (published 2023-11-16 on www.tidningenbalans.se). (Forssén 2023e). Forssén 2023e is also available on www.forssen.com.

[261] See section 1.

[262] Regarding special schemes on PMT for dealing with second-hand goods, works of art, collector's items, and antiques: see Ch. 20 of the ML (previously Ch. 9(a) of the GML) and Articles 311–343 of the VAT Directive.

where an ordinary agent relationship is invoked in opposition to what is meant with commission trading without any expansion to such trading comprising also representatives who are *comparable* with commissioners.

In section 6 of Forssén 2024c, I stated also that the SKV's perception of Ch. 6 sec. 7 of the GML as a special 'VAT commission rule' became all the more remarkable, when the SKV, by invoking that rule, asserted that the middleman would be deemed making an acquisition with respect of VAT from a mandator in another EU-state than Sweden, despite that the middleman was not deemed having any obligation to include the goods in question in a physical count of goods according to the act of 1955 thereon.[263] Then , the SKV claimed that commission trading could exist, instead of the middleman being deemed an ordinary agent, only because it was not possible to completely identify a mandator in the invoice from middleman to customer. The SKV claimed in such cases that the middleman was acting *in his own name* and that Ch. 6 sec. 7 of the GML thereby took over as precisely a special 'VAT commission rule' before what was stated about an ordinary agent relationship existing between the representative (the middleman) and his mandator. In this way, the middleman would be deemed having made a fictitious acquisition of goods from a trader in another EU member State than Sweden.

The problem in question concerned for instance whether taxable retailers in Sweden were entitled to apply PMT at acquisitions of used cars from car-dealers in other Member States in the EU. To have the right to use PMT on the sale he is making in his turn in Sweden it is demanded in such cases that PMT has been applied according to the other EU-state's rules on the sale there that corresponds to the retailer's acquisition. According to the HFD's cases RÅ 2009 ref. 40 I and II the Swedish retailer was therefore obligated to make a closer examination of whether the provisions for using PMT were fulfilled for the car-dealer in the other involved EU-state. If the circumstances were not such that it was possible to establish that a car-dealer in for example Germany had used PMT, and the Swedish retailer had not taken measures to make sure that this was the case, the HFD considered that the Swedish retailer was not entitled to use PMT on his further sale. Instead, he should use general VAT rules like an ordinary retailer and thereby take out VAT on the whole sales price to customer.

The described view on Ch. 6 sec. 7 of the GML by the SKV, the EBM and the HFD has led to bankruptcy for retailers of for example used cars, since they could not charge the raising of the VAT afterwards to their customers and what is worse that view sometimes led to criminal law consequences for them. That a fictitious acquisition of goods could be deemed made by the retailer from the mandator, with support of Ch. 6 sec. 7 of the GML as a special 'VAT commission rule', has thus meant a great legal uncertainty. Therefore, I iterate for reasons of legal certainty that it nowadays is demanded that a civil law agreement on commission trading exists, for a middleman to be compared with respect of VAT with an ordinary retailer concerning dealing with for instance used goods. In my opinion, this means that foreseeable decisions from the SKV should increase and lead to a more legal certain application of the ML, if the SKV accept that it at least nowadays must be considered clarified that the Swedish VAT legislation does not allow that a middleman can be deemed *comparable* with a commissioner in the way that the SKV has claimed concerning Ch. 6 sec. 7 of the GML and first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968 respectively.

[263] See *lag (1955:257) om inventering av varulager för inkomstbeskattningen* (the 1955 act on physical count of goods for the income taxation). See also Forssén 2019a, section 12 201 031.

That the expression ”*i eget namn*” (in his own name) has not been transferred from Ch. 6 sec. 7 of the GML to Ch. 5 sec. 3 second para no. 3 of the ML, at the same time as it therein is specified that it shall be a matter of *a commission agreement on purchase or sale*, means in my opinion that a correct implementation of Article 14(2)(c) of the VAT Directive nowadays exist in the Swedish VAT legislation, which I thus may repeat constitutes a bid plus with the VAT reform of 2023. In the same way that I as mentioned above perceive the Finnish tax authority regarding sec. 19 of the FML and sec. 4 third para no. 1 of the DML respectively, it is according to Ch. 5 sec. 3 second para no. 3 of the ML a matter of deciding if a middleman is an agent or a commissioner. Any third alternative that is opening for that it could be a matter of a representative who is *comparable* with a commissioner does not in my opinion exist in the Swedish VAT legislation – if this has been the case at all. However, it can, as I mentioned above at the judgment of RÅ 2002 ref. 113,[264] also occur a special intermediation service which the representative is supplying the mandator according to general VAT rules.

The VAT Directive mention, without defining it, *commission contract* in Article 14(2)(c), why I state that the civil law should decide the distinction between agreements on commission trading and ordinary agent agreements.[265] Thus, I consider that guidance should be fetched for that judgment in *kommissionslagen (2009:865)*, the Commission Act of 2009, where sec. 1 is stipulating that the act regards sale and purchase of chattels. Thus, it does not taken by itself regard services, but sec. 1 contains the concept ”*i eget namn*” (in his own name), why I deem that the Commission Act of 2009, together with *lagen (1991:351) om handelsagentur*, the Act on Trade Agency of 1991, where sec. 1 is stipulating that a trade agent is taking up offers to the mandator or concludes agreements in his name, give guidance to distinguish between agreements of on the one hand commission trading according to Ch. 5 sec. 3 second para no. 3 of the ML and on the other hand of an ordinary agent agreement, which is comprised by the general VAT rules of the ML. I could identify a problem with seeking guidance in the civil law for the distinction between agreements on commission trading and ordinary agent agreements already when preparing my lecture on ’VAT carrousels’ at Swedish Law Meeting over two decades ago.[266] It regarded that authors in civil law do not write anything about VAT.

I found a commentary from 1994 to the Act on Trade Agency of 1991 by a lawyer, Herbert Söderlund, that taken by itself mentioned the VAT,[267] but it was only in one section of about half a page, ”*Agenten och mervärdeskatten*” (the Agent and the VAT), which did not give any guidance for the determination of the scope of commission trading with respect of VAT.[268] What could have given some small guidance for that determination was a book by professor Hugo Tiberg and Rolf Dotevall, who then was a docent and nowadays is a professor, namely ”*Mellanmansrätt*” (Middleman law).[269] In the section ”*Handlande i eget namn*” (Acting in

[264] See section 4.

[265] See also Forssén 2019a, section 12 201 031.

[266] Forssén 2001.

[267] See Herbert Söderlund, *Agenträtt Kommentar till lagen om handelsagentur m.m*. (Agent law Commentary to the Act on Trade Agency etc.). Publica, Stockholm 1994. (Söderlund 1994).

[268] See Söderlund 1994, p. 164.

[269] See Hugo Tiberg and Rolf Dotevall, *Mellanmansrätt Nionde upplagan* (Middleman law Ninth edition). Norstedts Juridik AB, Stockholm 1997 (Print: Norstedts Tryckeri AB, Stockholm 2000). (Tiberg and Dotevall 1997).

one's own name) the two are reasoning about whether a broker, instead of being deemed an agent *would be regarded as commissioner or even retailer*. They state that in that case *the mandator in a power of attorney relationship must not be so unknown that he does not exist at the closure of the agreement*. They mean that the broker shall not be *allowed to afterwards finding a joint party who perhaps is insolvent and then avoid responsibility for himself as the representative not being responsible for the mandator's solvency!*.[270] It would have been interesting to know whether the two authors had any perception of and if so how the distinction between on the one hand agent and on the other hand commissioner or retailer could be decisive in that way also in relationship to the VAT's concepts to determine the tax subject. However, they do not mention VAT in the book "*Mellanmansrätt*". At the work with my doctor's thesis of 2013 on tax and payment liability to VAT in joint ventures and shipping partnerships, which concerned the so-called representative rule Ch. 6 sec. 2 of the GML (and Ch. 5 sec. 2 of the SFL),[271] I could also notice that the VAT is not mentioned by authors in civil law in that respect. Professor Dotevall, who was chairman of the grading committee, said to me after the disputation that my thesis – Forssén 2013 – thus will be – in a figurative sense – as a *cement* between the civil law and the VAT law regarding *enkla bolag* (joint ventures).

Lacking guidance from the civil law doctrine, I take as a starting-point that in the preparatory works to the Commission Act of 2009 it is stated that the mandator's interest of the transfer to a third man and the purchase from a third man respectively should decide the question whether the parties have made an agreement on commission trading. The legislator states – like the Finnish tax authority (see above) – that the question is decided by *a total judgment of the parties agreement, which is hard to try to regularize more direct in the act*.[272] Thus, in my opinion it has not been in compliance with the EU law in the field that the SKV claimed that Ch. 6 sec. 7 of the GML and first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968 respectively not only comprised commissioner situations, but besides also representatives *comparable* with commissioners, whereby the appearance of the invoice would have been decisive in that respect.

Nowadays, it may be considered as clarified that if there is no agreement in writing or other circumstances as guidance for a judgment in its entirety of what the parties have agreed in the present respect, the circumstance whether a mandator is fully identifiable in the invoice issued by the middleman to the customer taken by itself can be an indication for the judgment of whether an agreement on commission trading or an agent agreement exists with respect of VAT. However, it is in my opinion clarified by Ch. 5 sec. 3 second para no. 3 of the ML that the appearance of the invoice is not in itself decisive for this interpretation and application problem. Instead, I consider that the distinction between commission trading and ordinary agent relationships with respect of VAT should be decided by a judgment in full of such examples of signs regarding whether commission trading according to sec. 19 of the FML

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[270] See Tiberg and Dotevall 1997, p. 90.

[271] See Forssén 2013. See also Forssén 2024c, where I in section 5.5, "*Moms i enkla bolag och partrederier*" (VAT in joint ventures and shipping partnerships), comment that the rules in the GML which above all are of interest in that respect, i.e. Ch. 6 sec. 2 and Ch. 7 sec. 1 third para no. 9 respectively, have their correspondences in Ch. 4 sec. 16 and Ch. 9 sec. 16 respectively of the ML, whereby I state that certain questions that I brought up in Forssén 2013 on *enkla bolag* (joint ventures) remain also after the VAT reform of 2023.

[272] See prop. 2008/09:88 (*Ny kommissionslag*), New commission act, p. 56. See also Forssén 2019a, section 12 201 031.

exists like the Finnish tax authority bring up in its instruction of 2023-01-01. Also circumstances according to the SKV's list in the standpoint of 2020-09-25 on what the SKV deems constituting signs of the intermediary appearing as the purchaser's counterpart should be regarded to decide if commission trading exists, whereby I note that the examples in that list and that of the Finnish tax authority are on the whole the same. What in my opinion must be considered clarified above all by the VAT reform of 2023 is that the question whether the middleman receives the payment from the customer *and* omits to, in the invoice to that person, identify the mandator nowadays cannot in itself decide whether the middleman shall be deemed having the character of commissioner, regardless of whether it is a matter of mediation of goods or services. That is in line with what I also state above concerning the Finnish tax authority's perception in its instruction of 2023-01-01 for its judgment of whether commission trading exists.[273]

8 The question whether re-trials can be brought up in tax cases and tax fraud cases if the two main issues of a special 'VAT commission rule' can be questioned

Concerning the question whether a special 'VAT commission rule' has existed in Swedish VAT law, there are no decisions of guidance in the HFD or in the HD. Thus, there is no support in current law to judge the question whether first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968 or later Ch. 6 sec. 7 of the GML in itself could be deemed expanding who with respect of VAT is a commissioner to apply also to representatives *comparable* with commissioners. In the decision by the HFD mentioned in sections 4 and 7, RÅ 2002 ref. 113, that question is not given any attention as a special interpretation and application question on the theme of current law. Thus, that the SKV has invoked the preparatory works as support for the rules constituting such 'rubber rules' in relation to the civil law and the VAT Directive has not been tried by the HFD. Legislation shall not be made in the preparatory works, why the SKV's and the EBM's standpoint that a special 'VAT commission rule' of the mentioned meaning existed in older Swedish VAT law, which was invoked by them in matters and cases regarding for example such typical examples like those two which I call the main issues in this article, was in conflict with the principle of legality for taxation measures and punishment respectively according to Ch. 8 sec. 2 first para no. 2 of the RF and Ch. 1 sec. 1 of the BrB respectively.

As far as my experience goes, matters and cases about VAT frauds by carrousel trading at the time of my lecture at Swedish Law Meeting in 2001 – Forssén 2001 – meant that the SKV and the EBM used considerable efforts to judge details like whether a so-called intra-Community acquisition of goods – nowadays intra-Union acquisition (IUA) – existed in the actual matter and case. Nowadays, too many subjects are in my opinion involved in matters and cases on carrousel trading, whereby it is enough that a trader has electronical products in his assortment. This, despite what I express above from the Advocate General's Opinion in Joined Cases C-131/13, C-163/13 and C-164/13, meaning that although fraudsters often prefer goods like computer components or mobile phones, since those have a high unit value and are easy to transport, it may occur that normal undertakings are used with or without their knowledge. The Advocate General states that they can be involved in supply chains where this occur, and that "some traders in the supply chain" even "may not even be aware that they are participating in a fraud and may be acting in good faith". It is according to the Advocate

[273] See section 3.

General ”only the missing trader who commits fraud per se by failing to pay the tax due to the tax authorities”. The Advocate General also admits that the VAT system is fairly complex.[274]

The Advocate General’s viewpoints on ’VAT carrousels’ prove in my opinion that the SKV and the EBM during the years after my lecture in 2001 have come to drive matters and cases about such issues without the two administrative authorities fully regarding the principles according to Ch. 1 sec. 9 of the RF on everyone's equality before the law and matter-of-factness and impartiality. This since it according to what I – in my capacity of lawyer – have been able to notice is sufficient nowadays, for a trader to be involved as a suspect in a matter on assertion of VAT fraud of carrousel type, that he has traded electronical products, lie computers or mobile phones. Often there is not even a proper preliminary study made by the SKV in the SKV’s tax audit that the investigations in question by the SKV and the EBM normally begin with, which in my opinion shows that a too general selection of enterprises to investigate is made. In that respect, I am reminded of the fact that a tax audit is one of the most grave of interventions that the State can carry out against the individual, that is as in the matters in question against an entrepreneur. In my opinion, this in itself makes the described generalization on the SKV’s and the EBM’s part remarkable, why it might be questioned whether the investigations are fulfilling the constitutional demands on matter-of-factness and impartiality. The fact that the question of whether an examination should be made on which tax assessment bases for VAT apply is set aside too by the SKV causes the investigations on carrousel trading by the SKV and the EBM also being made without regard to the equally constitutional principle on everyone's equality before the law, whereby I may state the following.

Where the SKV claims that the accounting of VAT in an enterprise contains erroneous information, a comparison with cases regarding whether a retailer in Sweden is entitled to use PMT shows that the investigations and cases in cases of asserted carrousel trading are treated too general concerning what is the basic taxation question. I mention above that the HFD in RÅ 2009 ref. 40 I and II deemed that if a car-dealer in Sweden had not taken measures to make sure that for example a vendor in Germany of an actual used car had applied PMT the Swedish car-dealer could not apply PMT on his further sale of the car in Sweden. This meant that he would apply general VAT rules and thereby, like an ordinary retailer, take out VAT on the whole sales price, instead of only charging VAT on the profit margin.[275] The HFD mentions in RÅ 2009 ref. 40 II that what may disqualify PMT for the Swedish car-dealer are obscurities regarding whether the German car-dealer at his own acquisition of the car in question was entitled to use PMT according to the German VAT act (*Umsatzsteuergesetz*). If the German car-dealer had marked or signed his invoices with ”§ 25a”, that is that it was a matter of an IUA instead of ”*differenzbesteuerung*” – PMT in German – the SKV could have stated that it was unclear whether the Swedish car-dealer had the right to use PMT on his further sale.[276]

Thus, it is possible in practice for an entrepreneur to judge which circumstances that are considered constituting the problem according to the SKV with the question whether PMT can be applied, and he can thereby refute what is stated by the SKV and the EBM respectively

[274] See section 6.

[275] See section 7.

[276] See Forssén 2024c, pp. 66 and 67.

in a tax case and a tax fraud case respectively. With regard of the generalized attacks that can occur concerning asserted VAT frauds of carrousel type it is however in practice very hard for the entrepreneur to refute what the SKV and the EBM state on the theme of carrousel trading.

What is especially problematic to refute for the individual – the entrepreneur – is when the SKV in the tax audit assert that the entrepreneur has been in bad faith (mala fide) about being a link in a supply chain where VAT fraud of carrousel type occurs, only because he has traded electronical products, like computers or mobile phones. In my opinion, this means that the SKV anticipates what the tax fraud case that the EBM may start after a report on suspicion about tax fraud or coarse tax fraud according to sec. 2 or sec. 4 of the SBL may result in regarding the question of intent, which not even is the SKV's to judge. By the general mode of procedure that the SKV is using in the tax audit, which will constitute a central evidence in the tax case as well as the tax fraud case, the question *how* the entrepreneur is supposed to have done to appropriate through the VAT accounting money from the Swedish state, whereby it may be a question of the SKV claiming that it for instance is a matter of a partner in an *aktiebolag* (a limited company) withdrawing tens of millions of (Swedish) crowns from the tax account with his company as a tool of crime.

As far as my experience goes, the SKV makes, in cases of *missing trader*,[277] not only a decision of refusing an enterprise deduction of input tax, but the SKV also applies to the administrative court for a payment hedge against the enterprise and, if it is a limited company, also against the partners of the company, according to Ch. 46 sec. 5 of the SFL, and sues one or more of the partners before the administrative court for personal liability of payment, according to Ch. 59 sec. 16 of the SFL. The SKV presents thereby demands in these respects against partners of the company equal to the whole input tax regarding acquisitions which the SKV assert have been made from a *missing trader*. The question I consider should be asked in such investigations is *how* one or more of the partners of the company shall be deemed having – as the SKV use to express it – appropriate money from the Swedish state, that is the whole of that according to the SKV erroneous input tax in the VAT return issued. Above all, that question should be asked if – which is usual nowadays – cash transactions are lacking in the company, and it does not only exist input tax to account for but also output tax and therefore the whole of the accounted VAT is not resulting in excess input tax. An arrangement with an unfairly enrichment of the partners of the company should namely be apparent in such a case by the result in the company decreasing due to abnormal payments of salary or dividends to the partners or by corrected annual reports. Without the SKV answering the question *how* this is supposed to be done, the SKV makes reports on suspicion of tax fraud already after suggesting deciding to refuse the company deduction of input tax.[278]

By treating matters and cases about carrousel trading in such a tendentious way as recently described, the question will never be brought up whether the State's loss of VAT revenues is to be sought in unaccounted-for tax assessment bases by big international enterprises. In my opinion, it cannot be ruled out from the beginning of an investigation on carrousel trading that such enterprises should have accounted for VAT to the Swedish state in an ordinary VAT return to the SKV or via another EU-state's tax authority according to special schemes for VAT on distance sales of goods and services. This can be the case if they supply services in

[277] See section 6.

[278] See Forssén 2024a, section 2. There I mention the question *how* an *aktiebolag* (a limited company) shall be deemed use as a tool of crime in the case now in question.

Sweden consisting of licences on letting of software like operating systems in electronical products, for example computers and mobile phones.[279] Instead of them investigating if VAT on royalty should have been accounted for by a big international enterprise, I perceive that the SKV and the EBM are in the investigations on carrousel trading only setting their focus on small and medium-size Swedish enterprises (family enterprises and similar), and state that suchlike have been used as tools of crime. By in such a tendentious was omitting to examine the existence of unaccounted-for tax assessment bases for VAT at big international enterprises, I consider that the SKV and the EBM are violating the principle of everyone's equality before the law in Ch. 1 sec. 9 of the RF.

With regard of the lacks in the mode of procedure that I am stating regarding the SKV's and the EBM's investigations on carrousel trading and the clarification by the VAT reform of 2023 meaning that the ML does not contain any such 'rubber rule' that extends the character of commissioner with respect of VAT to comprise also representatives *comparable* with commissioners, I consider that there are reasons for entrepreneurs against who verdicts in such cases have been decided to their disadvantage in tax cases and tax fraud cases respectively to apply for a re-trial. In my opinion, the too general assumptions by the SKV and the EBM in the carrousel trading cases, and the fact that the ML is not expanding what is meant by commission trading in a way like what have been claimed on the SKV's and the EBM's part, mean that re-trials should be granted in carrousel trading cases.

In my opinion, the mentioned circumstances in tax cases and tax fraud cases respectively mean that reasons for re-trial exist, since the lacks in the investigations on the SKV's part are so decisive for the outcome of the legal trial that those constitute extraordinary reasons (Sw., *synnerliga skäl*) to try the matter again in the actual tax case, according to sec. 37(b) of the FPL. Because of the EBM basing its investigation on the result of the SKV's tax audit there exists a reason for a re-trial also in a tax fraud case, where someone in a case of the present sort has been sentenced for tax fraud according to the SBL, since *the application of law that constitute the basis for the verdict* in such a case thereby *apparently is in violation of law* according to Ch. 58 sec. 1 first para no. 4 of the RB. There is no support in the rules on auditing in Ch. 41 of the SFL for the SKV being allowed to carry out a tax audit in the described tendentious way, but the SKV shall be able to decide on taxation based on the result of the tax audit. Since a tax audit is one of the most grave of interventions that the State can carry out against an entrepreneur, the SKV's tendentious application of the rules in question, meaning that the SKV starts the audit set out from the assumption that tax fraud has occurred in the enterprise only because it has traded with electronical products, is in violation of the principle of proportionality in Ch. 2 sec. 5 of the SFL.[280] The mode of procedure is obviously in violation of the legislation on taxation procedure in the SFL, whereby I refer to Ch. 2 sec. 5 which has the following wording (in my translation): *By the principle of proportionality follows that decisions according to this act may be taken only if the reasons for the decision counterbalance the otherwise intervention or detriment that the decision means for the one who the decision concerns or for another opposite interest*.

[279] See section 6.

[280] See prop. 2010/11:165 (*Skatteförfarandet*), the taxation procedure, Part 1, p. 301, where the legislator, before the SFL was introduced on 1 January, 2012, noted that the principle of proportionality is a prescriptive principle in Swedish law which applies as a general legal principle within the administrative law. The legislator stated on p. 303 of the bill, that the SFL would contain a rule that the principle of proportionality applies, why the principle was codified for the taxation procedure by Ch. 2 sec. 5 of the SFL.

9 Concluding viewpoints

The central question of this article concerns whether Swedish VAT law has contained what I call 'rubber rule' that extended commission trading to comprise also representatives *comparable* with commissioners. The result of this was that the intermediary was compared with an ordinary retailer according to the general VAT rules. The person's taxable amount for VAT was deemed constituting the whole sales price to customer. The SKV has stated that such a special 'VAT commission rule' existed in the Swedish VAT legislation according to older Swedish VAT law, namely in Ch. 6 sec. 7 of the GML and in its predecessor, first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968. Set out from the SKV's standpoint of 2020-09-25, with the amendment of 2023-05-31 regarding the introduction of the ML, it is not clear whether the SKV takes the same standpoint after the ML having replaced the GML.[281]

However, I conclude that it is clarified by the VAT reform of 2023 that such a special rule no longer exists for VAT purposes. If such a special 'VAT commission rule' has existed at all in Swedish VAT law, the alteration of what is meant with a commission trading with respect of VAT by the introduction of Ch. 5 sec. 3 second para no. 3 of the ML means that current law has been altered in the present respect. In other words, there is no longer any 'rubber rule' meaning that itself causes an ordinary agent to be deemed tax liable (nowadays liable of payment) for the whole sales price to a customer instead of only for the commission that the person in question receives from the mandator, only because the agent (the middleman) has received the payment from the customer and it is not possible to identify the mandator in the invoice that the agent has issued to the customer.[282] In my opinion, it is requested nowadays that a civil law agreement on commission trading exists for a middleman to be compared for VAT purposes with an ordinary retailer.[283]

The alteration by Ch. 5 sec. 3 second para no. 3 of the ML of what is considered commission trading with respect of VAT shows in my opinion in itself that the SKV's and the EBM's perception of the scope of Ch. 6 sec. 7 of the GML and of the predecessor first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968 apparently was in violation of law. This since the application of law thereby was based on preparatory works, and not on the VAT act with the material rule of taxation, which was in conflict with the constitutional principle of legality for taxation measures.[284] In accordance with what I state in section 8, this should be regarded at applications for re-trial concerning tax cases and tax fraud cases regarding for example carrousel trading and cases on whether PMT was applicable for example concerning sales of a used car. I remind in this respect also of the Advocate General's perception in the Opinion in Joined Cases C-131/13, C-163/13 and C-164/13, meaning that the VAT system is fairly complex.[285] This, I consider gives a special confirmation of the legal certainty demand on foreseeable decisions not being sufficiently satisfied in the interest of the individual before

[281] See sections 2 and 3.

[282] See sections 2, 3 and 7.

[283] See section 7.

[284] See section 2 regarding the principle no tax without an act (*nullum tributumj sine lege*), which is expressed by the principle of legality for taxation measures according to Ch. 8 sec. 2 first para no. 2 of the RF.

[285] See section 6.

it was clarified by the VAT reform of 2023 that situations of commission trading with respect of VAT are not expanded to comprise also representatives *comparable* with commissioners.

By the way, it is confirmed in my opinion that the connection between a question on re-trial concerning a tax fraud case and a tax case, where the 'VAT commission rule' has decided the VAT taxation question to the individual's disadvantage in carrousel trading cases or cases on application of PMT, of what the legislator stated in connection with the reform of the SBL on 1 July, 1996, by SFS 1996:658. That reform meant that the expression *skattebedrägeri* was altered to *skattebrott* (Eng., both reading tax fraud) and that the crime was constructed as a danger offense instead of an effect crime, and the legislator expressed that what is an erroneous information must be decided with guidance of the rules in the taxation act that in the actual case regulates the tax liability and that *this connection between the tax fraud case and the tax matter itself must of course not be interrupted*.[286] Thus, in my opinion demands of legal certainty for the individual and his or her right of a fair trial according to Article 6(1) of the ECHR mean that this connection may neither be broken at the judgment of whether grounds for a re-trial exist.

Finally, I may reiterate what I have stated concerning a lacking registration control on the SKV's part, where it is a matter of which subjects are accepted in the VAT system. In Forssén 2013 I mention that the EU Commission already at that time had abandoned the attitude that as many enterprises as possible should be comprised by the VAT system to instead recommend restraint with registrations to VAT, so that priority would be given to registration control and questions about collection of VAT.[287] Thus, the SKV should set the focus on registration control where VAT is concerned, which I stated in Forssén 2013 and iterated in Forssén 2023c, section 8.2, Forssén 2023a, section 5 and Forssén 2024a, section 7 and furthermore mentioned in an article in the DJ in 2021.[288] However, I note in the context that it in the preparatory works to the reform *Det nya Skatteverket* (The new tax authority), which was introduced on 1 January, 2004, by *lag (2003:642) med anledning av inrättande av Skatteverket* (the act concerning the introduction of the tax authority), was not mentioned anything about VAT registration.[289] By a more efficient registration control with regard of the VAT, the SKV – and thereby also the EBM – should in my opinion be able to do a more precise choice of objects worthy to examine regarding examples of cases of carrousel trading or PMT-questions, and thereby abandon the tendentious mode of procedure for investigation and proceedings that I am bringing up in this article and which are risking to undermine the

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

[287] See 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.

[288] See Forssén 2021b in *ANNEX 3*. The four articles, Forssén 2021b, Forssén 2023a, Forssén 2023c and Forssén 2024a, are also expressed in Forssén 2024e (Eng., Forssén 2024f), where those in that order are to be found in chapters IV., II. and VI. And in *ANNEX 3*. Some other of the articles of mine which I am referring to in the present article are expressed in Forssén 2024e (Eng., Forssén 2024f), namely: Forssén 2022a, in chapter I.; and Forssén 2024d, in *ANNEX 5*.

[289] See The tax committee's consideration 2003/04:SkU2 [*Det nya Skatteverket (prop. 2002/03:99, delvis)*], The new tax authority (prop. 2002/03:99, partly), the government's bill (prop.) 2002/03:99 (*Det nya Skatteverket*), The new tax authority, and *departementspromemorian Ds 2002:15 (Det nya Riksskatteverket)*, the department memo Ds 2002:15 (The new National Tax Board). See also Forssén 2021b or Forssén 2024e (Eng., Forssén 2024f), *ANNEX 3*.

legal certainty for entrepreneurs. Instead of tax auditors trying to stop a river of problems with the State losing VAT revenues can a more efficient use of the function that I call the gatekeeper reduce those to trickles for investigation, whereby such generalizations at carrying out of the investigations at the SKV and the EBM that I am bringing up in this article can be abandoned. This demands a thorough investigation from the legislator since it can hardly be expected that the situation will be taken care of by the courts – that far is evidently not the principle *jura novit curia* (the court knows the law) reaching in Sweden concerning VAT law.

Another matter of legal certainty than the matters on re-trial that the administrative courts and the general courts may have to judge according to what I state in section 8 and above in this section concerns a rule in the Act on introduction of the BrB, namely sec. 5 second par. second sen.[290] By that rule in the BrP follows that if another act applies *when verdict is announced, that act shall be applied, if it leads to freedom from punishment or a mitigated punishment* (with the exception for *a deed which was punishable during a certain time due to then existing special reasons*). Regardless of whether the SKV – and the EBM – would be deemed having support for their standpoint about the existence of a special 'VAT commission rule' in older Swedish VAT law, has still the VAT reform of 2023 meant that this nowadays does not apply, according to Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML.[291] Based on this conclusion, I consider that if the EBM in an investigation concerning the time before 1 July, 2023 has invoked Ch. 6 sec. 7 of the GML as a 'rubber rule' regarding what is meant with commission, the general courts cannot pronounce sentence against the individual in such a case on 1 July, 2023 or later for tax fraud or coarse tax fraud according to sec. 2 or sec. 4 of the SBL. The question that is given rise to concerning the general courts is thus whether they will be able to handle the change of current law with respect of VAT in the present respect also regarding the principle of freedom from punishment which is stipulated in sec. 5 second para second sen. of the BrP.

[290] See sec. 5 second para second sen. of *lag (1964:163) om införande av brottsbalken*, the 1964 Act on introduction of the Penal Code, abbreviated BrP.

[291] See sections 2 and 3.

VIII. Questions on account of the final report Measures against VAT frauds[292]

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

1 Introduction

In the Balans, my Articles of 2023-06-13 and 2024-05-06 were published, which are a part of the background to this article.[293] In Forssén 2023a, I gave an accountant of the consequences for the issuer as well as for the receiver of an invoice with a falsely charged value-added tax (VAT), which I denote a "false VAT". In Forssén 2024a, I also brought up my viewpoints on SOU 2023:49. Thereafter came the final report to that investigation, SOU 2024:32. *Sveriges advokatsamfund* (The Swedish Bar Association) has submitted to the Treasury its considerations over SOU 2024:32, which was done on 2024-11-15.[294] I took part in a group of three lawyers who worked with the considerations. In this article, I follow up Forssén 2023a and Forssén 2024a concerning some questions that I consider remain after SOU 2024:32 and which to save space were not mentioned in the Bar Association's considerations of 2024-11-15 to the Treasury, inter alia a question about law trial of liability of payment for falsely charged VAT in cases of *missing trader*. Concerning law trial, I connect to yet another of my articles in the Balans, from 2018, and to my article in the DJ published on 2024-12-13.[295]

In Forssén 2024b, I state that a falsely charged VAT does not constitute VAT in a real sense, but if an amount is falsely denoted as VAT in an invoice a liability of payment of the amount exists. This follows of Article 203 of the EU's VAT Directive, which was implemented into the Swedish VAT legislation on 1 January, 2008, by SFS 2007:1376, whereby the directive rule was incorporated in the GML, more precisely in Ch. 1 sec. 1 third para and sec. 2 e of the

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[292] Article: *Frågor med anledning av slutbetänkandet Åtgärder mot mervärdesskattebedrägerier* (Questions on account of the final report Measures against VAT frauds), by Björn Forssén, Balans 2025 (published 2025-05-15). (Forssén 2025a).

[293] See Forssén 2023a and Forssén 2024a. See also Björn Forssén, "*Felaktigt debiterad moms föranleder betalningsskyldighet – inte skattebrott – 'karusellen' går vidare*" (Falsely charged VAT causes liability of payment – not tax fraud – the 'carrousel' goes on), DJ (*Debatt/*Debate), published 2023-11-27, at 11.44, on www.dagensjuridik.se, Forssén 2023f (*ANNEX 2*).

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

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

GML. Since the ML replaced the GML on 1 July, 2023, the rule is to be found in Ch. 16 sec. 23 of the ML, which has the following wording (in my translation): *Any person who has falsely charged VAT in an invoice or similar document is liable of payment to the State for the amount*. The amount does not constitute VAT according to the general rules of the ML but causes a liability of payment to the SKV for the issuer of the invoice, why I denote the amount false VAT.

Fictitious transactions are examples of cases of liability of payment for false VAT.[296] The receiver of an invoice with such a falsely charged VAT can be responsible of tax fraud according to sec. 2 of the Tax Fraud Act, i.e. the SBL, if he or she in a VAT return claim deduction for the amount in question like for input tax, whereas the issuer will not suffer any other consequence than the liability of payment, which applies as long as he or she is not issuing a credit invoice (which follows of Ch. 7 sec. 50 first para of the ML). In Forssén 2024b, I state that this follows of the preparatory works to the reform of 2008, where the legislator states the following (in my translation): *To further stress that a falsely charged VAT shall not lead to anything else than a liability of payment for the person who has falsely charged the VAT it is however suggested that the liability of payment for this false amount is stipulated in a separate section, Ch. 1 sec. 2(e) of the ML*.[297]

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

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

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

If there are extraordinarily reasons, release can be granted fully or partly from withholding of tax, social fees, VAT, or excise duties (Ch. 60 sec. 1 first para nos. 1 and 2 of the SFL). An application for release can be submitted to the SKV that makes its decision according to Ch. 13 sec. 12 of *skatteförfarandeförordningen (2011:1261)*, the Taxation Procedure Regulation. The decision can be appealed to the government, if the SKV rejects the application for release (Ch. 67 sec. 6 second sen. of the SFL). The HFD tries applications for law trial, according to sec. 3 of the act on law trial of certain government decisions. If a release is granted, it may also be given for a fee on delay, tax surcharge and interest (Ch. 60 sec. 1 second para of the SFL).

[296] See prop. 2007/08:25, p. 91.

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

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

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

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

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

I consider that the lack of a general right of access to courts conflicts with the very principle of access to courts according to Article 6 of the ECHR. The problem could have been resolved along with the reform of the RF in 2010, but this was not done and a direct connection to the ECHR was dismissed. This has been mentioned by Professor Wiweka Warnling-Nerep (nowadays Warnling Conradsson).[298] I have mentioned the question on page 16 in my e-book *Nya förvaltningslagen och skatteförfarandet – studiematerial*.[299] I emphasize the principle of access to courts as a support for the HFD admitting an application for a law trial of a release matter according to Ch. 60 sec. 1 of the SFL. In that respect, I note that sec. 1 of the act on law trial of certain government decisions is referring to Article 6(1) of the ECHR. Then, the question is whether what I call false VAT can be comprised by the concept VAT according to the institute of release in Ch. 60 sec. 1 of the SFL. That too is a ”gap” that should be addressed by the legislator so that the legal certainty can be maintained concerning the individual’s possibilities to be granted release from liability of payment of an amount constituting false VAT, where the right of access to courts does not cover such a demand regardless of how absurdly it may seem.

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

In the reports SOU 2023:49 and SOU 2024:32 a central question concerns finding measures against VAT frauds of so-called carrousel type. Therefore, the Bar Association brings up in its considerations to the Treasury of 2024-11-15 whether falsely charged VAT is comprised by ”*skatt*” (tax) according to the SBL in relation to the reform of 2008 regarding liability of

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

[299] See page 16 in *Nya förvaltningslagen och skatteförfarandet – studiematerial: Andra upplagan* (the new Administration Act and the tax procedure – study material: Second edition), by Björn Forssén, self-published 2019 (Forssén 2019f).

payment for falsely charged VAT in an invoice, where the problems in question concerns cases of so-called *missing trader*, that is of carrousel trading where the fraud quite simply consists of a trader disappearing.[300] In English, this is called *missing trader*.

The reform in 2008 meant that the State would not lose its demand against inter alia an issuer of a fictitious invoice. However, the Bar Association emphasized then that already the predecessor to Article 203, that is Article 21(1)(d) of the Sixth VAT Directive, should – as a mandatory directive rule – have been implemented into the GML at Sweden's accession to the EU in 1995, not first in 2008 as a measure of fighting crime.[301] In its considerations of 2024-11-15 the Bar Association once again emphasized that a rule on fighting crime does not belong in the tax legislation and stated that the legal certainty demands that it already in the legislation work on account of SOU 2024:32 is clarified whether falsely charged VAT is comprised by "*skatt*" (tax) according to the SBL. Regarding the VAT has, in pursuance of the principle of conferred competence, the Swedish parliament conferred competence to the EU's institutions (organs),[302] but the criminal law is a field where an in principle exclusive national competence applies.[303]

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

Here, I focus first on that the legislator should clarify whether the concept *mervärdesskatt* (value-added tax) in the institute of release according to Ch. 60 sec. 1 of the SFL is comprising what I call false VAT. In the predecessor to the SFL, it was stipulated in the so-called principle of equality,[304] that amounts according to Ch. 1 sec. 1 third para of the GML, that is falsely charged VAT, were equal to "*skatt*" (tax). It is also stipulated in Ch. 3 sec. 12 that what is said about VAT in the SFL applies also to such an amount, despite that it does not constitute VAT according to Ch. 1 sec. 1 third para of the GML. This is stipulated also regarding VAT according to Ch. 16 sec. 23 of the ML. The rules on procedure regard real or false VAT, whereas the institute of release only regards real VAT in a material sense. Thereby, I deem that Ch. 60 sec. 1 of the SFL contains a "gap" concerning the application of the institute of release regarding false VAT.

With respect of the right of access to courts not being general in Sweden, I consider that legal certainty reasons motivate an amendment in Ch. 60 sec. 1 of the SFL so that the institute of release comprise falsely charged VAT, which is what I call false VAT. I connect to Forssén 2018c, where I state that it in the preparatory works to the then applying *skattebetalningslagen (1997:483)*, the Tax Payment Act, was mentioned as an example of extraordinarily reasons for release that it would be a matter of a foreign entrepreneur, who is not registered to VAT in

[300] See the Bar Association's considerations of 2024-11-15 to the Treasury under the headline *Problematiken med bestämningen av "skatt" enligt skattebrottslagen och reformen år 2008 avseende betalningsskyldighet för felaktigt debiterad mervärdesskatt i faktura* (The problems with the determination of "*skatt*" (tax) according to the Tax Fraud Act and the reform of 2008 regarding the liability of payment for falsely charged VAT in an invoice).

[301] See prop. 2007/08:25, p. 86.

[302] See Ch. 10 sec. 6 of the RF.

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

[304] See Ch. 1 sec. 4 second para no. 3 of *skattebetalningslagen (1997:483)*, the Tax Payment Act.

Sweden and who has paid VAT on imports here, but cannot be reimbursed by his or her Swedish customer due to that person being in bankruptcy.[305] I stated that the situation with respect of procedure should belong to Ch. 60 sec. 1 of the SFL and that it for legal certainty purposes is precarious that such a second paragraph like in Ch. 13 sec. 1 of *skattebetalningslagen* for the situation has not been incorporated in Ch. 60 sec. 1 of the SFL.

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

6 Especially about the book-keeping and false VAT

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

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

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

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

In Ch. 5 of the ÅRL, it is stipulated what shall be accounted for in notes in the annual report. Concerning the demand of notes for smaller and larger enterprises, I consider that what is mentioned regarding so-called contingent liabilities (Sw., *eventualförpliktelser*) in Ch. 5 sec. 15 of the ÅRL is of interest in the present context. There, it is stipulated that if an enterprise has warranty commitments, financial commitments or eventual obligations which are not accounted for in the balance sheet (contingent liabilities) it shall inform about the sum of these. Regardless of whether false VAT has been paid or not to the State the liability of payment remains only until a credit invoice has been issued by the enterprise. Thereby, I consider that it is a contingent liability. The amount shall not be accounted for in the current recording.[306] However, I consider that a remaining liability of payment should be mentioned in a note to the enterprise's annual report, if the amount is essential.

[305] See Forssén 2018c, p. 4 and prop. 1996/97:100 Part 1, p. 596.

[306] Since the result must not be undervalued for income tax purposes, I consider that the amount must neither be carried as an expense.

Someone who issues an invoice with a falsely charged VAT is unlikely to mention this in a note to the annual report. However, demands to do so should be made so that it is not lying in the system that the responsibility for the situation only is placed on the receiver of the invoice. Furthermore, my example with fictitious transactions is only just an example of a case of liability of payment for false VAT. It may also be a case the issuer not having a clear knowledge of the VAT rules and just happened to charge VAT on goods or services comprised by exemption from VAT.[307] Then, this should be noted in the annual report, if there has not been time to issue a credit invoice before the year-end.

6.3 Falsely charged VAT and book-keeping crime

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

If the receiver of an invoice with a falsely charged VAT has booked the thus false VAT as input tax, he or she can also incur criminal law responsibility for erroneous information in the bookkeeping. Furthermore, a natural person who conducts activity under sole proprietorship or as a representative of a limited company (Sw., *aktiebolag*) can be deemed having incurred criminal law responsibility. In such a case it is a matter of the liability of payment for the contingent liability that the liability of payment to the State for the false VAT constitutes not being mentioned in a note in the enterprise's annual report and the balance of the business thereby cannot be judged on the whole at the issuer.[308]

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

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

If a credit invoice regarding the false VAT is issued the amount in question shall be altered.[309] By SFS 2003:1134 the Invoicing Directive 2001/115/EC was implemented on 1 January, 2004 into a new Ch. 11 of the GML, which nowadays is corresponded by Ch. 17 of the ML. By the

[307] See prop. 2007/08:25, p. 91.

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

[309] See Ch. 7 sec. 50 first para of the ML, which is corresponding to the previous Ch. 13 sec. 28 first para of the GML.

preparatory works to that reform follows that there is no time limit for the issuing of an invoice.[310] Since the receiver in bankruptcy's main task is to act for as favourable a liquidation as possible of the bankrupt's estate from the viewpoint of the creditors, it has been considered that the receiver in bankruptcy should be active by representing concerning the debtor's accounting of VAT so that levied VAT will be reduced if it is possible and can be expected being of importance for dividends in the bankruptcy. This follows of *Riksskatteverkets* (nowadays the SKV's) *Moms vid konkurs* (VAT at bankruptcy) from 1984.[311] Of interest in the present context is that therein was also stated the following (in my translation): *The debtor and the receiver in bankruptcy should consult each other at the drawing up of their returns. If the debtor does not file a return it is to be desired that the receiver in bankruptcy, on the request from* länsstyrelsen*, the county administrative board (nowadays the SKV, my remark), submits suchlike information that* länsstyrelsen *still can make as correct a taxation decision as possible*.[312] As far as my experience goes, there is no routine by the collective of receivers in bankruptcy regarding measures that should be taken by a receiver in bankruptcy concerning the debtor's accounting of VAT.

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

The responsibility to develop the recently mentioned routines for VAT at bankruptcy should in my opinion not rest with *bokföringsnämnden*, the Accounting Standards Board (abbreviated BFN), since the VAT legislation constitutes a special legislation in relation to the civil law accounting law in the form of *bokföringslagen (1999:1078)*, the Book-keeping Act, as general legislation and the BFN thereby cannot be expected to issue *allmänna råd* (general advice) etc. for the treatment of VAT at bankruptcy. In the previous statement BFN U 90:2 was also a reservation made that it did not rest with the BFN to interpret the VAT legislation due precisely to its character as special legislation in relation to the civil law accounting law. On the other hand, the BFN should stipulate in for instance a general advice that the issuer of an invoice with falsely charged VAT should state in a note in the enterprise's annual report that lability of payment to the SKV exists regarding the amount of such a false VAT, if the amount in question remains at the year-end and can be deemed essential. This is in pursuance of what I

[310] See prop. 2003/04:26, pp. 42, 48 and 84

[311] See *Riksskatteverkets* (the National Tax Board's) *Moms vid konkurs – information om hur man redovisar moms i samband med en konkurs* (VAT at bankruptcy – information on how to account for VAT in connection with bankruptcy), RSV 556 edit 1 (May 1984), under the headline *Behörighet att föra talan i skatteprocess* (Resolution to speak in tax proceedings), p. 13.

[312] See the mentioned *Riksskatteverkets Moms vid konkurs*, under the headline *Deklarationsskyldighet* (Liability to submit returns), p. 13.

state above about that it should not rest with the receiver of the invoice with a false VAT to maintain the control system.

8 False VAT in a fictitious invoice and personal liability of payment

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

Personal liability of payment according to the main rule in Ch. 59 sec. 13 of the SFL cannot apply to the representative of the limited company that has issued the invoice. The legislator states taken by itself in the preparatory works to the SFL that tax according to Ch. 59 of the SFL *is tax if the main responsibility regards tax*,[313] but an amount falsely denoted as VAT is not a real VAT but what I call a false VAT. Therefore, the main responsibility of the legal person which has issued the invoice does not regard *skatt* (tax) in a material respect, that is according to the ML. Legislation must not be made in the preparatory work itself, why I deem that it is not possible to impose the representative of the legal person a personal liability of payment according to Ch. 59 sec. 13 of the SFL, if the false VAT will not be paid by the legal person.

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

By the way, I state in section 4 of Forssén 2024a that the representative's liability is only mentioned in passing in SOU 2023:49 (on page 63) and then only concerning that there also exists in the SFL and the SBL rules on obstacles to applications of representative's liability concerning tax surcharge that regards a legal person and prosecution, penalty order or failure to prosecute, provided that the fault or passivity forming the base of the tax surcharge already is comprised by for example a prosecution regarding the same natural person and if responsibility already has been claimed against the same natural person. In my opinion, it is not sufficient on the theme of legal certainty for the individual that the investigation only mentions the representative's liability in relationship to the principle *ne bis in idem* (i.e. that the same thing

[313] See prop. 2010/11:165 Part 2, p. 905.

shall not be tried twice) concerning tax surcharge. Therefore, I consider that it should be carefully considered in what sort of situation the individual private person at all can end up against the State in connection with investigations of carrousel trading before the legislation procedure on account of SOU 2023:49 continues.

Thus, I may in the last-mentioned context especially notice that the Bar Association in its considerations to the Treasury of 2024-11-15 over SOU 2024:32 brings up that the *ne bis in idem*-question also comes up when the SKV goes into the question of intent by stating in its proposal of a decision that mala fide rests with the partners of a legal person, for example a limited company (Sw., *aktiebolag*), regarding VAT fraud by carrousel trading, despite that a partner and the company is not the same person. That the SKV uses the concept VAT fraud in connection with the assertion of mala fide by the partners of a limited company regarding that their company would be part of transaction chain constituting carrousel trading with the purpose of appropriating money from the Swedish state means according to the Bar Association that the SKV makes itself into a prosecutor. The Bar Association states that the intent is not for the SKV to investigate and that the only subjective that the SKV shall investigate is instead whether grounds for exemption from tax surcharge apply.[314]

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

Moreover, I state that what I mention in this article does not change my suggestions in Forssén 2024a, meaning that it should be considered whether the exemption from auditing liability for small enterprises shall remain, on account of the problems about the liability issue regarding false VAT for a *missing trader*.[315]

The Bar Association brings up in its considerations to the Treasury of 2024-11-15 that increased control of who is registered to VAT typically gives a more focused choice of investigation objects and concentrated matters and cases about tax fraud to counteract VAT frauds of all kinds – not only as a measure against carrousel trading.[316]

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

[314] See the Bar Association's considerations of 2024-11-15 to the Treasury under the headline *Betydelsen av uttrycken mervärdesskattebedrägeri och ond tro i Skatteverkets förslag till beslut för frågan om en rättvis rättegång för den enskilde* (The importance of the expressions VAT fraud and mala fide in the SKV's proposal for a decision for the question about fair trial for the individual).

[315] See Forssén 2024a, section 7, *Alternativ till förslagen i SOU 2023:49 för att motverka "momskaruseller"* (Alternatives to the suggestions in SOU 2023:49 to counteract 'VAT carrousels').

[316] See the Bar Association's considerations of 2024-11-15 to the Treasury under the headline *Ökad kontroll av vilka som registreras till mervärdesskatt ger typiskt sett ett mera fokuserat urval av utredningsobjekt och koncentrerade ärenden och mål om skattebrott* (Increased control of who are registered to VAT is typically promoting a more focused selection of investigation objects and concentration of matters and cases on tax fraud).

taken against for example VAT frauds by carrousel trading. It is first by the registration that he or she who is aiming to cheat can get hold of the public treasury in the form of the tax account system (*skattekontosystemet*). Thus, the EU Commission stated, already in a green paper in 2010,[317] that the Commission had given up the standpoint that as many enterprises as possible should be comprised by the VAT system to instead recommend restraint so that priority instead is given to registration control and questions about collection. In an article in the JFT, I state the same thing, whereby I express that instead of the tax auditors trying to handle a river of problems about the State losing VAT revenues can an efficient *gatekeeper* at the registration decrease the problems to mere trickles to investigate.[318]

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

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

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

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

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

It can be deemed as unclear whether the SKV considers that such a special 'VAT commission rule' as the SKV (and the EBM) has invoked exists also after that the ML replaced the GML,

[317] See section 5.4.1 *Översyn av uppbörden av mervärdesskatt* (Overview of the collection of VAT), in the EU Commission's green paper KOM(2010) 695 slutlig [COM(2010) 695 final] and the EU Commission's follow-up to the green paper, COM(2011) 851 final, p. 6.

[318] See Forssén 2024b, section 9. See also Forssén 2021b and Forssén 2023c, section 8.2.

since the SKV in its standpoint of 2020-09-25 only made an amendment of 2023-05-31 – before the introduction of the ML – meaning that its legal judgment remains.[319]

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

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

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

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

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

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

[319] See Forssén 2024b, sections 2, 8 and 9.

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

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

12 Electronical products and taxable amount for VAT – a special problem

In Forssén 2024b, I chose VAT frauds by carrousel trading as the subject to problemize the question about the existence of a special 'VAT commission rule', whereby I connected especially to my article on that question in the DJ concerning the treatment with respect of VAT in the SKV's and the EBM's investigations on carrousel trading of licences regarding operating systems in electronical products like computers and mobile phones.[320]

I iterate from Forssén 2024b that the mentioned question – as far as my experience goes – is not usually mentioned in such investigations but that this should be the case especially concerning the theme of composite transactions. In my opinion, it is important, regardless of whether the SKV, like I bring up above in this article, also after the ML having replaced the GML is sticking to its perception of the existence of a special 'VAT commission rule', that it will be noticed in the SKV's and the EBM's investigations that the mentioned products consist of both for example the mobile phone (goods) and the operating system (the service). Otherwise, the investigations are misdirected from the beginning by the taxable amount for VAT regarding the service not being regarded but only VAT on the goods.

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

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

In connection with investigations concerning VAT frauds, it is not unusual that the EBM brings up questions about commercial money laundering (which is also called professional money laundering) according to sec. 7 of the Act on Punishment for Money Laundering. In

[320] See Forssén 2024b, section 5 and the reference there to Forssén 2024d.

Forssén 2023c and Forssén 2024a, I mention commercial money laundering,[321] but I do not make any deep analysis of that question in this article. However, I may mention the following about the connection between the crime commercial money laundering and especially regarding tax fraud, since it is occurring that the EBM in its investigations only focus on those two crimes and leaves questions about book-keeping crime open:

- If the question about tax fraud is failing in the mentioned situations it can at least not be deemed constituting a so-called for crime (Sw., *förbrott*) in a prosecutor's deed description on the theme of commercial money laundering. Thereby, the circumstance in the Bar Association's considerations of 2024-11-15 to the Treasury, meaning that the connection between erroneous information according to the SBL and the tax rules cannot be disrupted, is important also at the trial of the question about commercial money laundering.[322]

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

- However, in the last-mentioned case can criminal responsibility exist for abusive practice (Sw., *förfarandemissbruk*) instead of regarding tax fraud. I consider that it is not to be taken for granted that abusive practice *in itself* leads to criminal responsibility and commercial money laundering is unlike tax fraud an effect crime, not a risk crime, but I may emphasize that commercial money laundering is lying near at hand to abusive practice concerning VAT, by the suspected taking part in a measure to hide that for example money originates from crime or criminal activity.[323]

I stay at these viewpoints on the question about commercial money laundering but refer also to Forssén 2024a. There, I reason about the legal certainty principle on double criminality (Sw., *dubbel straffbarhet*) in Ch. 2 sec. 2 second para of the BrB. Then, the question concerns whether commercial money laundering comes up if tax fraud in Sweden shall be deemed a for crime in relation to commercial money laundering in another involved EU Member State, where tax fraud is not determined as a risk crime but as an effect crime.[324]

[321] See Forssén 2023c, sections 5.4, 7.2 and 8.2 and Forssén 2024a, sections 3 and 7. See also Forssén 2023b.

[322] See the Bar Association's considerations of 2024-11-15 to the Treasury under the headline *Betydelsen för en rättvis rättegång för den enskilde av beskrivningen av skattefrågan i Skatteverkets förslag till beslut samt frågan om verket ska återgå till att avfatta slutresultatet av skatterevisionen i en revisionspromemoria* (The importance for a fair trial for the individual of the description of the tax question in the SKV's proposal of decision and the question whether the SKV shall go back to drawing up the final result of the tax audit in an auditing memo).

[323] See Forssén 2023c, section 5.4. See also Forssén 2022a, Forssén 2023d and Forssén 2018a.

[324] See Forssén 2024a, section 7.

ANNEX 1 – The prices of foodstuffs cause law alterations and planning regarding indirect taxes[325]

On the Swedish Television's (Sw., *Sveriges Televisions*, 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 the 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 Ch. 7 sec. 2 first para second sen. of the GML,[326] which is nearest corresponded by Article 73 of the EU's VAT Directive, 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 bill (prop.) 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 2018a, i.e. "*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).

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 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

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

[326] The GML was replaced on 1 July, 2023 by the ML.

from 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 Ch. 9(c) of the GML 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 those are sold during the time being 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 HFD must, however, not a hidden interest compensation lowering 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.

In my mentioned article, the question 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 Ch. 9(c) of the GML can be lowered due to measures which have taken place during that time, when the goods are sold after being taken out from the warehouse and thus comprised by the general taxation of transactions of goods and services according to Ch. 3 sec. 1 first para of the GML. 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 being placed in the warehouse in question, but I deem that it is possible according to the special rules on who is tax liable in Ch. 9(c) of the GML.

If it is possible with such a matching that I mention in the article, the three big players within the [Swedish] 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 Ch. 9(c) sec. 9 of the GML, and I mention some 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 those 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 being 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 for 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 2022a, ”*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 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 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 2022a, 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 Forssén 2018a 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 Forssén 2018a.

ANNEX 2 – Falsely charged VAT causes liability of payment – not tax fraud – the 'carrousel' goes on[327]

In two previous debate articles in the DJ, "*Livsmedelspriserna föranleder lagändringar och planering avseende indirekta skatter*" (The prices of foodstuffs cause law alterations and planning regarding indirect taxes), of 2023-03-15, and "*Näringspenningtvätt i momskarusell*" (Commercial money laundering in VAT carrousel), of 2023-10-02,[328] I have referred to my article in Forssén 2022a, i.e. "*Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704*" (VAT frauds of so-called carrousel type and NJA 2018 p. 704),[329] where I reason set out from that case in the HD, 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 the SKV 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 ML, 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 the GML 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 appeal's judgment of the tax fraud question according to sec. 2 of the Tax Fraud Act, i.e. the SBL.

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

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[327] 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, DJ (*Debatt*/Debate), published 2023-11-27, at 11.44, on www.dagensjuridik.se. (Forssén 2023f).

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

[329] See Chapter I.

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.

Concerning the deduction question, the prosecutor' attitude 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. 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 of 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 the 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),[330] which was published on 2023-06-13, 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 the SFL, 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.[331]

[330] See Chapter II.

[331] 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[332]

I follow up my articles in the DJ of 2019-02-19 and 2019-03-11, where I mention the relationship between the defence lawyer's role and the EBM's in cases on tax fraud. This time, I bring up more about the relationship between the tax authority, i.e. the 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 at all. They shall 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 into 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 those 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 actually sailing about in the Pacific Ocean.

[332] Article: "*Rätt resurs på rätt ställe minskar momsbedrägerierna*" (The right resource on the right place decreases the VAT frauds), by Björn Forssén, DJ (*Debatt/*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 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.

Taken by itself, reverse charge means that the flow of liquid between enterprises and the State is replaced with accounting of the VAT as a taxation of 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.

With this article, I may 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, and the EBM shall neither 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 from 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 – Gap in the customs act opening for unintended VAT deduction due to two different determinations of who is a taxable person[333]

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

1 Introduction

In the article Exemption from tax – a mercy to make a quiet payer for at the tax authority's head office and the government or try for legality at the HFD, in this no. of the Balans, I state that in the rule on possibility to exemption from certain taxes and fees in Ch. 60 sec. 1 of the SFL a paragraph is lacking corresponding to the second paragraph in the rule's predecessor, Ch. 13 sec. 1 of *skattebetalningslagen (1997:483)*, the Tax Payment Act, so thar the institute of exemption could be applicable to such "import-VAT" which is not comprised by *tullagen (2016:253)*, the Customs Act, abbreviated TL, but by the SFL. That relationship is to the individual's disadvantage concerning legal certainty. In this article, I continue with another gap in the law which instead can open for arrangements meaning that for example a holding company, a non-profit association and a registered religious community can be entitled to deduction for "import-VAT", despite that goods are not sold further and leading to liability to account for output tax but used for pure consumption. The assumed gap exists in the Customs Act, and can be used in that way depending on that the GML contains two determinations of the concept *beskattningsbar person* (taxable person) – the general in Ch. 4 sec. 1 and the special in Ch. 5 sec. 4 which is used in connection with application of the rules in Ch. 5 of the ML that determine whether a supply of a service is made within or outside the country.[334]

2 Problem definition and judgment

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

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[333] 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), by Björn Forssén, Balans 3/2018 pp. 17–19. (Forssén 2018b).

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

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

> *The SKV considers that it can be presumed that a legal person who report his registration number to VAT to the Customs at the import is acting in his capacity of taxable person. The report can be made by invoking a so-called EORI-number which is connected to the importer's VAT registration number.*[335] *The result of that reference is that the VAT at the import shall be accounted to the SKV in a VAT return.*

Regarding SFS 2014:50, act on alteration in the ML, and SFS 2014:51, Act on alteration in the Customs Act (2000:1281), abbreviated GTL, which by the way was replaced on 1 May, 2016 by the TL,[336] there is a registered matter at the Treasury of 2014-12-12 (Dnr. Fi2014/4452), where I pointed out an assumed gap in the act regarding the rules about that the SKV on 1 January, 2015 took over the value-added taxation of a certain sort of imports from the Customs. I have described the problem as follows:

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

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

Since the second demand for the SKV being the taxation authority according to Ch. 2 sec. 2 of the TL is – as in the predecessor Ch. 5 sec. 11(a) first para no. 1 of the GTL, its wording according to SFS 2014:51 – that the person filing the return etcetera is VAT registered in Sweden, and Ch. 8 sec. 2 fourth para no. 2 of the ML stating that with input tax is also regarded tax pertaining to imports and tax liability occurring for imports according to Ch. 1 sec. 2 first para no. 6 of the GML, right of deduction for input tax corresponding with the VAT on the import emerges according to Ch. 8 sec. 3 first para of the GML for those subjects, regardless of whether they in their activities are supplying taxable goods or services. Thereby

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

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

an apparent risk exists for so-called arrangements, where for example a non-profit association that acquires some service from abroad, and thereby is *beskattningsbar person* (taxable person) according to Ch. 5 sec. 4 of the GML, combines it by importing goods for pure consumption without any further sale being made on which output tax would be accounted for, and still getting deduction for input tax on imports. The taxation for withdrawal of goods is nor possible in such a situation, since such taxation hits a *beskattningsbar person* (taxable person) according to Ch. 2 sec. 2 first para of the GML, and then it is a matter of *beskattningsbar person* (taxable person) according to Ch. 4 sec. 1 of the GML.

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

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

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

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

> *Value-added tax according to sec. 1 first para shall not be taken out according to this act but in pursuance of the SFL if the person filing the return or, if the person filing the return is a representative, the person on whose account the representative is acting, is registered to VAT in Sweden at the time for the decision on establishing customs and*
> 1. *is acting in the capacity of* beskattningsbar person *(taxable person) according to the GML, ”vid” (at) the import or*

2. *is a legal person which is not acting in the capacity of beskattningsbar person (taxable person) according to the VAT act at the import*. (Note! My italicizing of the word *vid* in item 1.)

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

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

3 Conclusions

I have pointed out to the Treasury the existence of a risk for arrangements, since Ch. 5 sec. 11 a first para nos. 1 and 2 of the GTL had not been 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 ML* (Sw., *utom i den särskilda betydelse begreppet ges i 5 kap. 4 § GML*). That the expression is still lacking in Ch. 2 sec. 2 first para of the TL means in my opinion there is a gap in the law, namely a gap in the Customs Act. The assumed gap *can* give an unjustified right of deduction for input tax on import according to Ch. 8 sec. 3 first para of the GML. There exists in my opinion an apparent risk for the following arrangement:

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

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

I pointed out to the Treasury the thus presumed gap in the Customs Act on 2014-12-12 and the Treasury answered on 2014-12-16 (Dnr. Fi2014/4452). What is in my opinion precarious is that the government referred to await the case-law rather than making my suggested alterations of the present rule in the Customs Act to reduce the risk of undesired arrangements regarding VAT due to the presumed gap in the act. The legislator had the opportunity to easily rectify the gap, when the TL replaced the GTL on 1 May, 2016.

By the way, I may mention that since there is no Swedish rules on either thin capitalization or holding companies, the difference between *beskattningsbar person* (taxable person) according to Ch. 4 sec. 1 and according to Ch. 5 sec. 4 respectively in the GML can be of interest in connection with the judgment whether an arrangement is comprised by the EU law principle of prohibition of abusive practice for VAT purposes. Of interest in that respect might inter alia reflections that I made in my doctor's thesis about holding companies in connection with certain EU-cases be, inter alia item 28 in C-142-99 (*Floridienne*), etcetera.[337]

[337] See Forssén 2013.

ANNEX 5 – ’VAT carrousels’ and the alteration of the special intermediation rule by the new VAT act[338]

In the GML, 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, i.e. the 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 the VAT Act of 1968 and originated from the third para first sen. of the instructions to sec. 12 of the 1959 General Tax on Goods. I have made comments on Ch. 6 sec. 7 in various contexts. For example, references to the preparatory works in question are to be found in Forssén 2024b, section 2.

By the new VAT Act – i.e. the ML – was the GML 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 ML, which in principle correspond with Article 14(2)(c) and Article 28 respectively of the EU’s VAT Directive. 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 ML, 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 ML. 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 ML*. 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 ML, 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).

I consider that the alteration consisting of the special intermediation rule Ch. 6 sec. 7 being adjusted to the VAT Directive breaks the perception existing from time to time by the SKV

[338] 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, DJ (*Debatt*/Debate), published 2024-05-16, at 11.56, on www.dagensjuridik.se. (Forssén 2024d).

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 ML 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 Ch. 6 sec. 7 is in investigations and cases regarding 'VAT carrousels', and I focus on 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 2001. As above-mentioned, the lecture memo is available on https://www.forssen.com/forskning/f13/. On page 7 of the memo that the participants at my lecture received, I am stating that Ch. 6 sec. 7 of the GML 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 the DJ 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 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 the EBM 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.[339] What is shocking to me is that 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

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

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 and normally the supply of it shall be treated in itself for VAT purposes – as 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 "Ch. 6 sec. 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 them 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.

CONCLUSIONS – SOME LEGAL CERTAINTY ASPECTS

1 Introduction

Concerning the previous chapters and annexes, I give in this chapter some concluding aspects on the previous chapters and annexes with the focus set on the topic of legal certainty, where I also make procedural remarks in that respect. I raise these aspects especially with regard to the reform introducing the ML on 1 July, 2023.[340] The ML replaced the GML of 1994 and I express in chapter VII. my article Forssén 2024b, where I mentioned that one of the rules that was to be found in the GML, that is Ch. 6 sec. 7,[341] had been altered by Ch. 5 sec. 3 and sec. 27 of the ML, so that it nowadays better corresponds with the nearest corresponding rules in the VAT Directive, that is the Articles 14(2)(c) and 28, which I also mentioned in Forssén 2024d – expressed in *ANNEX 5*. In relation to the general VAT rules of the legislation, the rule constituted one of the special rules on who is tax liable (nowadays liable for payment) in certain cases.[342] Like in Forssén 2024b and Forssén 2024c, I call the special rule in question a special 'VAT commission rule', since it in practice has been considered applying not only in cases of commission trading in a civil law sense, according to the SKV.[343]

In perspective of legal certainty, the problem is that the SKV in one of its standpoints has made an addition meaning that the SKV considers that its perception of current law still would be correct concerning the special 'VAT commission rule' also after the introduction of the ML on 1 July, 2023. I argue for the opposite viewpoint and in Forssén 2024b I mention consequences in the form of lost tax revenues for the State regarding trade in computers and mobile phones if the 'VAT commission rule' may in practice have a continued application by the SKV allowing above all big international enterprises not to be taxed for VAT purposes for royalty on software and instead tries to take out the VAT for both hardware and software from a middleman whose taxable amount should only consist of the commission from the mandator, that is from such an international enterprise.

At the review in the present respect of the special rule in question, I use the expressions actual current law and current law in a true sense respectively considering what is deemed applying with respect of VAT. Thereby, I consider that an actual current law can exist by the SKV – in the form of administrative practice – or by the district administrative courts and the administrative courts of appeal, that is an actual current that has not been expressed by the

[340] See Forssén 2024c and also Forssén 2020a.

[341] The rule was to be found also in the predecessor to Ch. 6 sec. 7 of the GML, i.e. in first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968.

[342] See Forssén 2024b, p. 294 and Forssén 2024c, p. 64.

[343] See Forssén 2024b, pp. 294 and 295 and Forssén 2024c, pp. 64, 66 and 67.

HFD or the CJEU, whereas this is the case regarding current law in a true sense.[344] Thereby, the CJEU is the utmost interpreter of the EU law.[345]

In the present case, a legal uncertainty exists for the individual, that is for the tax subject in the capacity of an entrepreneur. Concerning the importance of the ML having replaced the GML on 1 July, 2023, the SKV has regarding the question of the existence of a special 'VAT commission rule' only made in that for the question interesting standpoint of 2020-09-25 an addition, "Nytt: 2023-05-31" ('News: 2023-05-31'), where the SKV notes that the ML does not mean any alteration of the SKV's legal judgment.[346] No analysis is presented regarding whether the rule still shall be considered constituting a special rule with an application exceeding cases of commission trading in a civil law sense.

In the following, I am going through how I deem that the SKV, by lacking analysis of the importance for the deduction question and the tax subject question of the ML having replaced the GML, has contributed to perceptions about the existence of an actual current law concerning the present issue regarding middlemen. Perceptions about the existence of an actual current law deviating from the VAT Directive means that the legal certainty is undermined for the entrepreneur in cases on VAT and connected questions in Sweden.

2 The 'VAT commission rule' – legal uncertainty due to addition in standpoint by the SKV

The central question in Forssén 2024b concerned whether Swedish VAT law has contained what I call a 'rubber rule'. If so, it means according to the SKV that the concept commissioner (or commission trading) was expanded to comprise also *comparable representatives*. The result of this was that the middleman would be deemed an ordinary retailer according to the general VAT rules. Thereby, the tax assessment basis for instance for an ordinary agent, which consists of a commission from the mandator, would instead be constituted of the whole sales price to customer. As above-mentioned, according to the SKV such a special 'VAT commission rule' existed in older Swedish VAT law, namely in Ch. 6 sec. 7 of the GML and in its predecessor, first para of item 3 of the instructions to sec. 2 of the VAT Act of 1968.[347]

Here, I express Ch. 6 sec. 7 of the GML, which the SKV thus has claimed constitutes a special 'VAT commission rule' and Articles 14(2)(c) and 28 of the VAT Directive respectively:[348]

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[344] See Forssén 2019d, section 1.4 (*Språkliga frågor* – Language questions). In Forssén 2019d, I use the expressions *faktisk gällande rätt* (actual current law) and *gällande rätt i egentlig mening* (current law in a true sense) respectively in the following sections: 1.3.2, 2.5, 3.1, 3.3.1, 3.3.3.1, 3.3.4, 3.11.3, 3.11.5, 5.1.1, 5.1.3, 5.1.11, 5.2.1, 5.2.3, 5.2.8.1 and 5.2.8.3.

[345] That the CJEU is the utmost interpreter of the EU law follows by the highest court in a Member State being supposed to obtain a preliminary ruling from the CJEU concerning an interpretation question that the national court cannot manage. See Article 267 third para of the TFEU.

[346] See the SKV's standpoint of 2020-09-25, *Förmedling av tjänster i eget eller i annans namn, mervärdesskatt* (Intermediation of services in one's own or somebody else's name, value-added tax), dnr 8-314934, section 3.2. See https://www4.skatteverket.se/rattsligvagledning/384806.html?date=2020-09-25 (visited 2025-07-14). See also Forssén 2024b, p. 300.

[347] See Forssén 2024b, pp. 326 and 327.

[348] See Forssén 2024b, p. 295.

Ch. 6 sec. 7 of the GML (in my translation)

If anyone acting in his own name mediate goods or services on behalf of another person and receives the payment for the goods or services shall at the judgment of the tax liability for the transaction of goods or services, this be deemed made by himself as well as by his mandator.

Article 14(2)(c) of the VAT Directive

"2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale."

Article 28 of the VAT Directive

"Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself."

By the ML replacing the GML, I stated in Forssén 2024b that the special intermediation rule of Ch. 6 sec. 7 of the GML was altered, so that it nowadays consists of two rules, Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML. Those correspond in principle both the mandatory rules in question of the VAT Directive, that is Article 14(2)(c) and Article 28. The two rules in the ML have the following wordings:[349]

Ch. 5 sec. 3 second para no. 3 of the ML (in my translation)

With supply of goods shall also be meant transfer of goods in pursuance of a commission agreement on purchase or sale.

Ch. 5 sec. 27 of the ML (in my translation)

If a taxable person in his own name but on behalf of another person takes part in a supply of services, the taxable person himself shall be deemed acquiring and supplying those services.

I noted that the criterion about the middleman *receiving the payment for the goods or services*, which existed in Ch. 6 sec. 7 of the GML as well as in the VAT Act of 1968, has not been transferred to Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML. Furthermore, I noted that the expression *in his own name*, which existed in Ch. 6 sec. 7 of the GML as well as in the predecessor of the VAT Act of 1968, has not been transferred from Ch. 6 sec. 7 of the GML to Ch. 5 sec. 3 second para no. 3 of the ML, which is in compliance with Article 14(2)(c) of the VAT Directive, where that expression does not exist concerning intermediary situations constituting commission trading of goods. Instead, the expression *in his own name*

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[349] See Forssén 2024b, pp. 295 and 296.

is to be found in Article 28 of the VAT Directive concerning middleman situations regarding supply of services, and it has been retained also in Ch. 5 sec. 27 of the ML. Thereby, a correct implementation nowadays exists in the Swedish VAT legislation of the directive rules regarding intermediary situations concerning commission trading of goods and supply of services respectively.[350] Setting out from the SKV's standpoint of 2020-09-25, with the addition of 2023-05-31, it is unclear if the SKV still considers this after the ML having replaced the GML.[351]

I concluded that it may be deemed clarified by the VAT reform of 2023 that it no longer exists such a special 'VAT commission rule' that the SKV has asserted, if a suchlike at all can be deemed having existed in the Swedish VAT law. By the introduction of Ch. 5 sec. 3 second para no. 3 of the ML current law has been altered in the present respect. There is no longer any 'rubber rule' entailing that an ordinary agent could be tax liable (nowadays liable for payment) for the whole sales price of goods or services to customer, instead of only regarding the commission that the agent receives from the mandator only because the agent (the middleman) receives from the customer and it is not possible to identify the mandator in the invoice issued by the agent to the customer. In my opinion, it is nowadays requested that a commission trading in a civil law sense exists for a middleman to be compared for VAT purposes with an ordinary retailer.[352]

The alteration by Ch. 5 sec. 3 second para no. 3 of the ML of what is considered as commission trading with respect of VAT shows in itself that the SKV's perception about the scope of Ch. 6 sec. 7 of the GML and of its predecessor in the VAT Act of 1968 obviously was not complying with law. Thus, the SKV's perception and the actual application of law were only based on the preparatory works. The SKV has, to support its standpoint that the concept commissioner is broadened due to the 'VAT commission rule' to comprise also *comparable representatives*, asserted that it in the preparatory works of the VAT Act of 1968 was stated that the expression *in his own name* would regard *commissioners and comparable representatives*.[353] That the SKV's standpoint thereby was not based on the VAT act and the material taxation rule was in conflict with the constitutional principle of legality for taxation measures.[354]

With regard to the risk that other administrative authorities, like the EBM, and the first and second instances of the administrative courts respectively apply an actual current law based on the SKV's perception in the question about the existence of a special 'VAT commission rule', and not on an analysis of the material taxation rule itself, the SKV contributes to a continued legal uncertainty by the SKV in its addition of 2023-05-31 to its standpoint of 2020-09-25 merely notes that the ML does not cause any change of the SKV's legal

[350] See Forssén 2024b, p. 296.

[351] See Forssén 2024b, sections 2, 3 and 9.

[352] See Forssén 2024b, sections 2, 3, 7 and 9.

[353] See prop. 1968:100, p. 121. See also Forssén 2024b, sections 2 and 9 and Forssén 2024d, in *ANNEX 5*.

[354] Compare the principle no tax without an act (*nullum tributumj sine lege*), which is expressed by the principle of legality for taxation measures according to Ch. 8 sec. 2 first para no. 2 of the RF. See also Forssén 2024b, sections 2 and 9.

judgment.[355] Above all for an agent, the present situation is not foreseeable, where he or she cannot rely on the letter of the act and the wording of the directive rules in question. With its addition to the standpoint in question, the SKV may namely be perceived continuously asserting that for instance an ordinary agent can be comprised by a special 'VAT commission rule' being considered a special rule – a 'rubber rule' – making the agent comparable for VAT purposes with a trader, by commission trading with respect of VAT being possible to expand in addition to cases of commission trading in a civil law sense. I repeat from Forssén 2024b that the question arising is whether the SKV puts forward its addition and at the same time regards that the legislator in its proposal of 17 February, 2022 made to the Council on Legislation for consideration abandoned the perception in SOU 2020:31 (*En ny mervärdesskattelag* – A new VAT act) meaning that Ch. 6 sec. 7 of the GML would get an exact correspondence in the ML.[356] In my opinion, the circumstance that this was not realized speaks in itself for the ML having altered current law so that no such special 'VAT commission rule' asserted by the SKV exists anymore in Swedish VAT law, if it at all has existed according to current law in a true sense. The described lack of foreseeability that the SKV's standpoint, with the mentioned addition of 2023-05-31, meant thus a great legal uncertainty for the individual with respect of VAT and it might lead to difficult consequences in the form of raised value-added taxation with resulting tax proceedings and criminal law proceedings.

3 Parallel current law in Sweden on the *'VAT commission rule'* – consequences

3.1 The question about the 'VAT commission rule' in relation to SOU 2023:49 and SOU 2024:31

An undesired parallel current law in Sweden compared with the EU law in the field of VAT on the described case regarding middlemen as a result of the SKV's lack of analysis of the tax subject question its standpoint of 2020-09-25 after the introduction of the ML leads to uncertainty for the individual, since the foreseeability of taxation decisions is lost by the development of an actual current law in that respect. The consequences for the individual, that is the tax subject in the capacity of an entrepreneur will be very far-reaching and serious by such decisions from the SKV. Before I go further with a review of the consequences, I am setting in this section the mentioned matter of the development of an undesired actual current law which conflicts with the EU law in the field in relation to the investigation *Åtgärder mot mervärdesskattebedrägerier* (Measures against VAT frauds). The investigation has submitted to the government the partly report *Skyddet för EU:s finansiella intressen Ändringar och kompletteringar i svensk rätt (SOU 2023:49)*, The Protection of the EU's financial interests Alterations and completions in Swedish law (SOU 2023:49), and the final report *Åtgärder mot mervärdesskattebedrägerier (SOU 2024:32)*, Measures against VAT frauds (SOU 2024:32). The investigation was supposed to lead to legislation on 1 July, 2025 but this has not been the case.

A few years ago, I started writing on what became a series of articles which concern issues regarding VAT frauds of so-called carrousel type (carrousel trading). This subject was also mentioned in SOU 2023:49 and SOU 2024:32. The longer of the articles in my series during the period of 2021–2025 are published in the JFT and in the Balans and in one case in the

[355] See the SKV's standpoint of 2020-09-25, dnr 8-314934, section 3.2. See also Forssén 2024b, p. 300.

[356] See Forssén 2024b, p. 301.

SST.[357] I have commented SOU 2023:49 and SOU 2024:32 respectively in the Balans on 2024-05-06 and on 2025-05-15 respectively.[358] Forssén 2024b was published on 2024-11-01 and in June 2024 the Swedish Bar Association (*Sveriges advokatsamfund*) had appointed me author in a working team to make a draft of considerations to the Department of Finance over SOU 2024:32. The proposal was approved and the Swedish Bar Association's considerations of 2024-11-15 over SOU 2024:32 were submitted to the Department of Finance (the Treasury).[359]

In Forssén 2024b and in the Bar Association's considerations of 2024-11-15 to the Treasury, the perception is mentioned that the Advocate General stated in the Opinion for a judgment to the CJEU regarding a matter of so-called *missing trader* concerning carrousel trading.[360] Inter alia, the Advocate General mentioned in the Opinion for a judgment to the CJEU in Joined Cases C-131/13, C-163/13 and C-164/13 that *missing trader* is a case of carrousel trading where the fraud quite simply consists of a trader disappearing. The receiver of an invoice makes a deduction for charged input tax, but any output tax is not accounted for by the vendor, or it is made at a low amount and for example the goods in question are put into circulation again.[361] The Advocate General stated that this type of fraud can affect various categories of goods. According to the Advocate General, goods such as computer components (cp. Sw. language version, '*datorer'* – i.e. computers) or mobile phones are preferred by fraudsters, as those have a high unit value and are easy to transport. Moreover, the Advocate General stated that it is not a matter of normal chains of transactions, but of activities organized solely for a tax fraud to be carried out but that it also occurs that ordinary businesses are used, with or without their knowledge, and that some traders may not even be aware that they are participating in a fraud and may be acting in good faith. According to the Advocate General, "it is only the missing trader who commits fraud per se by failing to pay the tax due to the tax authorities". The Advocate General admitted that the VAT system is fairly complex, but that a complete neutrality of benefits it, whereas "the other side of the coin is that the complexity of the system makes it easier to perpetrate fraud using its own mechanisms".[362]

Concerning the case about the issue on the existence of a special 'VAT commission rule', I mention in the following the consequences of an actual current law which is not in compliance with the EU law in the field partly for the State, partly for the individual. Before I started the article series on carrousel trading, I had already on 2001-11-14 given the

[357] For interested researchers or for ideas at essay-writing, I refer to https://www.forssen.com/forskning/f13/, where it is stated which of my articles that constitutes the series.

[358] See Forssén 2024a and Forssén 2025a.

[359] The Bar Association's considerations of 2024-11-15 to the Treasury, No. R-2024/1201 – see https://www.advokatsamfundet.se/.

[360] See Joined Cases C-131/13, C-163/13 and C-164/13 (ECLI:EU:C:2014:2455) and the Advocate General's Opinion (ECLI:EU:C:2014:2217).

[361] See items 32–34 of the Advocate General's Opinion in Joined Cases C-131/13, C-163/13 and C-164/13. See also Forssén 2024b, p. 313.

[362] See items 31–37 of the Advocate General's Opinion in Joined Cases C-131/13, C-163/13 and C-164/13. See also Forssén 2024b, pp. 313 and 314.

mentioned lecture on the subject at Swedish Law Meeting.[363] Thereby, I mentioned inter alia the special 'VAT commission rule', that is Ch. 6 sec. 7 of the GML.[364] For the individual, that is the tax subject, the matter of bad faith (mala fide) or good faith is central in the investigations and cases carried out by the SKV or the EBM on the theme of carrousel trading. In my opinion, the question about a continued actual current law meaning that the special 'VAT commission rule' still could expand the concept tax liability (nowadays liability of payment) to comprise also middleman situations which are not constituting commission trading in a civil law sense is decisive concerning the legal certainty for inter alia ordinary agents, since an application of such a special rule normally means an unexpected raise of the taxable amount.

3.2 The problems with an actual current law on the 'VAT commission rule' is procedural

That such an actual current law as above-mentioned regarding a special 'VAT commission rule' constitutes a problem in Sweden has to a large extent its explanation in the academics not having useful influence with the legislator. In a series of articles during 2020–2023 published in the JFT and The Periodical Balans, I reviewed all theses in Sweden during 1994–2020 on the subject indirect taxes (i.e. in the first place VAT, excise duties and customs), where twelve of fourteen concerned VAT. A common denominator for my criticism of the VAT research was just that the researchers pass over the tax subject question to instead directly treat the object question.[365] Besides my two theses,[366] there is only one Swedish thesis in VAT law that concerns the tax subject question. It is *Mervärdesbeskattning vid obestånd* (Value-added taxation at insolvency) by Jesper Öberg, but there the EU law is sparsely treated with the motivation that *the EC's legislations only give the frames and must be filled out by national rules*, whereby he noted that any correspondence to those for the examination central rules on bankruptcy in the GML did not exist in the then VAT directives.[367]

By and large, I leave out the question about the influence of the research on the legislator's work with the VAT legislation. Instead, I focus on the procedural question in the present context. In that respect, it is my experience that the existence of an actual current law is expressed by the application in itself of the rule in question, that is when it is treated in the taxation procedure at the SKV and in the tax proceedings, which are started in the district administrative court. The loss of interpretations expressing a perception of current law in a true sense open for application of an actual current law. That entails a risk of the development of a parallel current law in Sweden which conflicts with the EU law in the field.

In the following, I come back to the Swedish system with leave to appeal in the HFD being criticized by Denmark as a circumstance which can lead precisely to the development of a

[363] Forssén 2001.

[364] See Forssén 2001, p. 7. See also Forssén 2024b, p. 313.

[365] For interested researchers or for ideas at essay-writing, I refer to https://www.forssen.com/forskning/f10/, where it is stated which of my articles during 2020–2023 that mention the theses in Sweden on the subject of indirect taxes during the period of 1994–2020.

[366] See Forssén 2011 and Forssén 2013.

[367] See Jesper Öberg, *Mervärdesbeskattning vid obestånd Andra upplagan* (Value-added taxation at insolvency Second edition), Norstedts Juridik AB 2001 (Öberg 2001), p. 19. See also Forssén 2020b, pp. 733 and 738.

parallel current law compared with the EU law in the field of VAT. The situation causes not only an unexpected decision by the SKV of a raise of VAT which can be decided after a tax audit and leads to a tax case, if the enterprise appeals the decision to the district administrative court. In addition, there will usually also come up matters on stay of payment, payment hedge and personal liability of payment (if the raise of the VAT concerns for example a limited company) and a criminal case about in the first place tax fraud against natural persons carrying out activities under sole proprietorship or partners in a limited company etc., whereby prosecutors also can call for trading prohibition and enterprise fine. Thus, the issue about the existence of an actual current law by the SKV and at the first and second instances of the general courts and the administrative courts is in the first place procedural.

Concerning the consequences for the individual of a parallel current law based on an actual current law, I limit this presentation to the procedural problems regarding VAT and tax surcharge and criminal law responsibility. The situation becomes especially complex and problematic for procedural purposes, when the SKV can be considered developing an actual current law which is not complying with the EU law in the field of VAT regarding a continued application of the special 'VAT commission rule' also after the introduction of the ML. Concerning carrousel trading, the SKV namely in general reports to the EBM about suspicion of tax fraud against entrepreneurs and, if it is a matter of legal persons, against their owners. If the preliminary investigation is not closed, a prosecutor decides on prosecution by issuing writs against those suspected and then a case is started at the district court on tax fraud regarding VAT fraud of carrousel type, whereby the decision to bring charges normally also comprise book-keeping crime. Furthermore, such a decision on prosecution is not seldom combined with charges on commercial money laundering, either at the same time as the preliminary investigation on tax fraud is started or before a decision on prosecution.

3.3 Regarding cases of application of the special 'VAT commission rule'

3.3.1 Liquid consequences for the State and the individual of decisions causing false VAT

There are many different versions of the phenomenon VAT frauds by carrousel trading, but as a common denominator it is about frivolous enterprises taking 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 conflicts with the EU law in the field of VAT, since Article 1(2) of the VAT Directive inter alia means that VAT is "a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged".[368] Moreover, it is stated that "the he common system of VAT shall be applied up to and including the retail trade stage".[369] The VAT principle in Article 1(2) also means that right of deduction of input tax levied in a received invoice arise for an enterprise that is a purchaser of goods or services when such deductible VAT becomes liable of payment as output tax by the selling enterprise (the reciprocity principle).[370] Unless

[368] See Article 1(2) first para of the VAT Directive.

[369] See Article 1(2) third para of the VAT Directive.

[370] The reciprocity principle follows of Article 1(2) second para and Article 167 of the VAT Directive.

those circumstances according to Article 1(2) are fulfilled regarding a tax named VAT it is not VAT in the meaning of the EU law.[371]

An often-occurring example of VAT frauds of so-called carrousel type is, as mentioned, a case of *missing trader*. This means that it in a chain of enterprises exists a fictitious enterprise, which in the investigations by the SKV – and the EBM – is called a *missing trader* (or goalkeeper company or front enterprise). This means that an enterprise issues an invoice with what I, as also mentioned, call a false VAT.

In an article, I have accounted for the consequences for issuers as well as receivers of fictitious invoices with an amount falsely denoted as VAT.[372] The implementation of article 203 of the VAT Directive in the GML, by SFS 2007:1376, leads inter alia for that case of falsely charged VAT to the issuer having a special liability for payment of such an amount, that is for a false VAT, as long as a credit invoice of the amount is not issued. If a credit invoice regarding the false VAT is not issued the amount shall namely not be altered.[373] By the preparatory works to the reform of 2008 it follows that the legislator considered 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 did not constitute VAT according to the GML, but what I call false VAT. By the liability of payment for such a false VAT being regulated in a separate rule, Ch. 1 sec. 2(e) of the GML, the legislator emphasized that the measure meaning a false charge of VAT shall not lead to anything else than a special liability of payment for the amount in question for the enterprise issuing the invoice.[374] Since it is no longer a matter of tax liability (nowadays liability of payment) for a ”real VAT” for the issuer the reciprocity principle is not fulfilled according to the Articles 1(2) and 167 of the VAT Directive why the receiver of the invoice is not allowed to deduct the amount in question as an input tax.[375] In the context, it may be mentioned that fictitious transactions constituted one of a number of examples that the legislator stated at the reform in 2008 of such false charging of VAT in an invoice which is regarded now.[376]

By the VAT reform of 2023, I consider, as mentioned, that it no longer exists any ‘rubber rule’ that would entail that an ordinary agent can be deemed liable for payment of VAT on the whole sales price of goods or services to customer, instead of only regarding the commission that the agent receives from the mandator only because the agent receives the payment from the customer and it is not possible to identify the mandator in the invoice issued by the agent to the customer. Nowadays, it is requested, as also mentioned, that a commission trading in a civil law sense exists for a middleman like for instance an agent shall be compared for VAT

[371] See Forssén 2023c.

[372] See Forssén 2023c.

[373] See Ch. 7 sec. 50 first para of the ML, which corresponds with previously Ch. 13 sec. 28 first para of the GML. See also Forssén 2025a.

[374] See prop. 2007/08:25, p. 90. Ch. 1 sec. 1 third para and sec. 2(e) of the GML are corresponded by Ch. 16 sec. 23 of the ML. Ch. 8 sec. 2 first para of the GML is corresponded by Ch. 13 sec. 4 nos. 1 and 2 of the ML. See also Forssén 2023a, p. 3.

[375] See Forssén 2023a, p. 3.

[376] See prop. 2007/08:25 , p. 91, where fictitious transactions are mentioned as the eighth of the examples in question.

purposes with an ordinary retailer. Here, I refer to Forssén 2024b and the question there about carrousel trading and composite transactions consisting of an electronic product – for instance a computer or a mobile phone – constituting goods and at the same time a service in the form of a licence regarding the operating system for the product.[377]

The software that exists in the computer, or the mobile phone consists of an operating system. It is not owned by the trader, but of another enterprise on the market for such the products. It is often a big international enterprise that owns the licence for the operating system also after the consumer has purchased the computer or the mobile phone from the trader, that is usually from a retailer with an ordinary shop for electronical products. Thus, the sale of a computer is not only of importance for the transaction of the goods in question. Each computer comprises an OEM-licence and normally the supply of it shall be treated by itself with respect of VAT, as a supply of services, and the same applies to mobile phones.

As far as my experience goes, the SKV (and the EBM) usually do not mention any other taxable amount for VAT than that of the trader in their investigations concerning VAT frauds by carrousel trading with electronic products like computers and mobile phones. Thereby, the SKV is not treating whether the State loses VAT revenues due to the VAT not being accounted for by the big international enterprises owning the software in such products.

Thus, the SKV and the EBM should in their investigations of carrousel trading also consider whether big international enterprises correctly account for VAT on the taxable amounts regarding licences for operating systems in for example computers or mobile phones. Before that question has been the subject of an empirical examination, I consider it is pointless to refer the State's loss of VAT revenues in cases of suspected carrousel trading to wholesalers or retailers. The problem concerning whether the SKV (and the EBM) are considering that taxable amounts regarding licences for operating systems should be determined for the big international enterprises owning the systems is decisive to avoid an erroneous taxation of wholesalers and retailers that only sells for instance the mobile phone the final customer, the consumer. Concerning the problems about the phenomenon of carrousel trading, I focus on the special 'VAT commission rule' being, as I stated already in the lecture of 2001 (see Forssén 2001), invoked by the SKV (and the EBM) to justify above all that middlemen like wholesalers shall be charged with VAT on a taxable amount corresponding with the full amount received from the next wholesaler in a chain of transactions or from the retailer, if the retailer is the next enterprise in the chain. To correctly investigate a trader disappearing – a *missing trader* – suspected of making a fictitious transaction in the chain under the impression of having a role as a wholesaler in that respect, I therefore suggest that the SKV (and the EBM) in their investigations on suspected carrousel trading divide for instance a computer or a mobile phone into goods and services respectively. The sale that the wholesaler makes should not be investigated setting out from the pre-condition that it is a matter of a product regarded only as goods, whereby the question on a taxable amount for VAT regarding the licence of the operating system is left out by the SKV (and the EBM).

By the SKV's attitude to the element of big international enterprises in the investigations, the State loses tax revenues, since a middleman that only has an income of commission does not have economy enough to pay a demand from the SKV as if VAT should have been accounted for on the whole gross amount received from the customer. Thus, the State cannot enforce a demand against a middleman that should have been directed to the owners of the operating

[377] See Forssén 2024b, section 6.

systems regarding the VAT on royalty for their licences of the systems. The situation for the middleman is one of legal uncertainty, if that person is declared bankrupt due to the SKV's demand and lacks means to go further with a tax case on the matter. Furthermore, in my experience the receivers in bankruptcy do not assist the debtor by sanctioning that the debtor issues a credit invoice so that at least a falsely charged VAT can be excluded from collection. If a credit invoice regarding the false VAT is issued would, as mentioned, the amount in question be altered.

3.3.2 Especially about criminal law responsibility in connection with false VAT

3.3.2.1 Invoice with false VAT – liability of payment the only consequence for the issuer

By the preparatory works to the reform of 2008 it follows, as mentioned, that the legislator considered that a falsely charged VAT does not lead to anything else than a special liability of payment for the amount in question for the enterprise having issued the invoice. This applies if only the issuer's responsibility is concerned, since it does not exist any payment crime for instance regarding accounted but not paid VAT. It does not exist any payment crime in itself concerning the tax account system which was introduced on 1 November, 1997 by *skattebetalningslagen (1997:483*, i.e. the Tax Payment Act).[378] Thereby, the tax fraud according to the SBL regards false or unaccounted tax, that is it constitutes an accounting crime. Since any payment crime does not exist in the Swedish penal (criminal) legislation, cannot someone who in the capacity of real or fictitious vendor of goods or services be sentenced for tax fraud only because he or she has not paid a real or false VAT to the State.[379] The failed payment is not in itself sufficient for penal criminal law responsibility existing, but the situation will be another depending on what measures for instance a receiver of an invoice with a falsely charged VAT take for accounting purposes with such a false VAT.

If the receiver of the invoice knew or should have known that the information of VAT in the received invoice was false, but still tries to exercise right of deduction by submitting the amount of a false VAT in a VAT return to the SKV as if it constituted input tax it is in my opinion a matter of a case of abusive practice which can cause criminal law responsibility both for the issuer and the receiver of the invoice.[380]

In Forssén 2023c, I developed especially the question whether issuing of an invoice with false VAT can cause criminal law responsibility.[381] Here, I refer to the following from that review.

If an enterprise, for example a natural person (sole proprietorship) or a legal person like a limited company has issued an invoice wherein an amount falsely is denoted as VAT the amount – the false VAT – shall be accounted for in a special tax return,[382] whereas real VAT

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[378] See prop. 1996/97:100 Part 1, p. 450. See also Forssén 2023c, p. 361. Inter alia the Tax Payment Act was replaced on 1 January, 2012 by the SFL.

[379] See Forssén 2023c, p. 365.

[380] See Forssén 2023c, p. 345.

[381] See Forssén 2023c, pp. 361–365 (section 5.4 "*Faktura med oäkta moms och straffrättsligt ansvar*" – Invoice with false VAT and criminal law responsibility).

[382] See Ch. 26 sec. 7 of the SFL.

shall be accounted for in a VAT return.[383] That the as VAT falsely denoted amount constitutes a false VAT does not mean that the issuer of the invoice hast 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 value-added tax (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 SFL only a matter of the usage of certain terms and expressions in the SFL itself why an amount which constitutes a false VAT thereby may be deemed as *skatt* (tax) only concerning the procedure for its accounting, not materially. To determine what is *skatt* (tax) materially by a procedure rule in the SFL is in conflicts, in my opinion, with the principle of legality for taxation measures in Ch. 8 sec. 2 first para no. 2 of the RF.[384]

Thus, I consider that 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 not be deemed committing tax fraud according to sec. 2 of the SBL, since an erroneous information regarding *skatt* (tax) which shall be accounted for in a VAT return do not come up in such a case. Tax surcharge can neither be imposed on false VAT, since the sanction tax surcharge is imposed on *skatter* (taxes) which are comprised by the SFL.[385] Thus, the only consequence for the issuer of a falsely charged VAT is procedural and regards the liability to pay the amount in question as long as a credit note is not issued.[386]

3.3.2.2 Invoice with false VAT – criminal law responsibility for issuer and receiver if deduction is claimed

However, tax fraud can come up according to sec. 2 of the SBL 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. Then, criminal law responsibility may come up also for him or her who has issued the invoice with the false VAT. This follows by he or she might be punished 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 claim right of deduction for the amount. That situation can be subject of investigations by the SKV and the EBM in connection with cases regarding VAT frauds by carrousel fraud, where a *missing trader* exists in a chain of enterprises. If the receiver of the invoice knew or should have known that the information on VAT in the invoice was false it is thereby 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.[387]

[383] See Ch. 26 sec. 21 of the SFL.

[384] See Forssén 2023c, pp. 361 and 362.

[385] See Ch. 49 sec. 2 of the SFL. See also Forssén 2023c, p. 362.

[386] See Forssén 2023c, p. 362.

[387] See Forssén 2023c, p. 362.

3.3.2.3 Invoice with false VAT – abusive practice does not need to cause criminal law responsibility in itself

Here, I disregard questions about book-keeping crime that the issuer and receiver of the invoice with false VAT may have committed according to Ch. 11 sec. 5 first para of the BrB due to erroneous information being submitted in the book-keeping or the annual report. Instead, I reiterate my statement in an article from 2022, where I commented a verdict by the HD, NJA 2018 p. 704.[388] Although 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. This with regard to the senior judge of appeal, who was dissentient and wanted to acquit the defendant, inter alia stated that the CJEU in a case 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 unjustifiable.*[389] I also noted, the senior judge of appeal furthermore 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 it must be foreseeable for the individual, where he or she can be subject of criminal law intervention.[390]

Stig von Bahr, formerly judge in the HFD and the CJEU, wrote, as mentioned, von Bahr 2022 as a complement to Forssén 2022a 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*.[391] I gave my viewpoints to Swedish Tax Journal on the manuscript to Stig von Bahr's article and emphasized that I in Forssén 2022a 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 my noticing of the nuance of what my expression *in itself* (Sw., *i sig*) means. Thus, the reader gets the impression that Stig von Bahr goes further than I, by him so categorically dismissing my warning for abusive practice on the theme of criminal sanctions.

In my opinion, NJA 2018 p. 704 means, with regard to the statements by the senior judge of appeal, that it is not clear that abusive practice *in itself* means that criminal law responsibility exists, but this *can* be the case. For me, it is not far-fetched that it can exist various criminal law questions in a case of abusive practice, like the mentioned situation regarding exercise of right of deduction for false VAT charged in an invoice or above all at suspicion of commercial money laundering. In the following, I come back to prosecution where suspicion on VAT fraud of carrousel type is combined with prosecution for suspicion of commercial money laundering.

[388] See Forssén 2022a, 125. See also Forssén 2023c, p. 344.

[389] See Joined Cases C-255/02, item 93. See also Forssén 2023c, pp. 362 and 363.

[390] See Forssén 2023c, pp. 362 and 363.

[391] See von Bahr 2022, p. 499. BF, Björn Forssén (my note). See also Forssén 2023c, p. 364.

4 Tax fraud and commercial money laundering

4.1 Suspicion of carrousel trading and combination of tax fraud and commercial money laundering

In the capacity of practician, my experience is that the SKV sometimes specify its assertions on arrangements regarding carrousel trading to the error concerning the accounting of VAT being a matter of the entrepreneur aiming to *appropriate money from the Swedish state*. Then, it is not seldom lying near at hand for a prosecutor to either complete a suspicion of tax fraud or alter the description of the deed by stating that it is a matter of commercial money laundering.[392] In cases on suspicion of carrousel trading, this means that the prosecutor asserts that one or several enterprises in a chain of transactions appropriate money from a tax authority within the EU and that an enterprise in Sweden takes part in it, which according to sec:s 3 and 7 of the Act on Punishment for Money Laundering means that the suspect is taking part (Sw., *medverkar*) in measures to hide that *money or other property originates from crime or criminal activity or that the possibilities of somebody to profit by the property or its value are promoted*.[393]

Since, as mentioned, no payment crime exists in the Swedish criminal legislation and a falsely charged VAT only will have the consequence that a liability to pay such an amount to the State, he or she who in the capacity of real or fictitious seller of goods or services cannot be sentenced for tax fraud only because he or she has not paid the real or false VAT to the State. That *in itself* is not enough for criminal responsibility to emerge, since the tax fraud is, as also mentioned, an accounting crime, where the concept erroneous information (Sw., *oriktig uppgift*) is the prerequisite in sec. 2 of the SBL linking together the criminal law with the tax law and the concept tax surcharge.[394]

Taken by itself, commercial money laundering is, unlike tax fraud, not a risk crime, but an effect crime why the situation concerning proof is harder for the prosecutor with regard to that circumstance. However, it is, as mentioned, not seldom lying near at hand for the prosecutor to complete a suspicion of tax fraud or to alter the description of the deed by stating that it is a matter of commercial money laundering. Therefore, commercial money laundering is, in my opinion, in practice lying near at hand to abusive practice regarding VAT by the suspect *taking part in a measure that reasonably can be assumed taken for the purpose of hiding that for instance money originates from crime or criminal activity etc*.

Thus, I consider – as I stated in Forssén 2022a and Forssén 2023c – 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 of commercial money laundering criminal responsibility exist also for abusive practice.

[392] See sec:s 3 and 7 of the Act on Punishment for Money Laundering. See also Forssén 2023c, p. 365.

[393] See Forssén 2023c, p. 365.

[394] See prop. 1995/96:170, p. 91. See also Forssén 2023c, p. 361.

4.2 The combination of tax fraud and commercial money laundering – a need for precedents

With regard to the EBM not seldom claims responsibility for commercial money laundering at the same time as for tax fraud, when it is a matter of suspicion of carrousel trading, I consider that such a case should be tried by HD for guidance of the application of law. The development of the application of law concerning VAT frauds of carrousel type has gone in such a direction, by addition of commercial money laundering to the context, that NJA 2018 p. 704 is not sufficient as guidance, especially as the question on intent was not comprised by the leave to appeal in the case.[395] The rules in the Act on Punishment for Money Laundering refer in sec. 7 to sec. 3 but not to sec. 4, where the legislator expressly states that an intent of indifference can cause responsibility. I consider that that structure of rules and the legislator's comparison with professional fencing (Sw., *näringshäleri*) according to Ch. 9 sec. 6 second para of the BrB means that commercial money laundering presupposes an activity – a taking part – by the perpetrator. Therefore, the prosecutors should not use expressions like intent (Sw., *uppsåt*) in a description of a deed regarding commercial money laundering according to sec. 7 of the Act on Punishment for Money Laundering. In that respect, I compare the prerequisites for professional fencing with aim (Sw., *avsikt*), which was one of the subjective prerequisites for tax fraud before that crime was altered into a risk crime on 1 July, 1996, by SFS 1996:658, and nowadays only intentionally (Sw., *uppsåtligen*) is stipulated as subjective prerequisite for tax fraud according to sec. 2 of the SBL. This means that an intent of indifference nowadays is sufficient regarding both when erroneous information is submitted in a return and when a return is not submitted at all.[396]

As support of a need for a precedent from the HD as guidance for the application of law in cases of suspected carrousel trading, where the prosecutor asserts responsibility for commercial money laundering at the same time as responsibility for tax fraud, I furthermore state what the legislator has expressed about crime competition. Since self-laundering (Sw., *självtvätt*), that is laundering of profits from one's own criminality, is comprised by the rule on punishment in above-mentioned sec. 7, the legislator states that situations of competition also can araise in relationship to the for crime (Sw., *förbrottet*). Moreover, the legislator states that general criminal law principles mean that a certain subsequent action is considered to be included as such a natural part of the for crime that it shall be considered as consumed by and punished together with the for crime. The legislator states that the court therefore normally should sentence to responsibility only regarding the for crime.[397]

In Forssén 2024d, I reasoned also about the legal certainty principle on double criminal liability in Ch. 2 sec. 2 second para of the BrB. Then, the question concerned whether commercial money laundering can come up if tax fraud in Sweden is supposed to be a for crime to commercial money laundering in another involved EU Member State, where tax fraud is not determined as a risk crime, but as an effect crime. In Forssén 2025a, I mentioned this, since the question on double criminal liability is one of the questions that I deem remain for the legislator to bring up after SOU 2024:32. Here, I repeat that Sweden, by not solving the question on double criminal liability regarding for crimes at the trial of commercial money

[395] See Forssén 2023b and Forssén 2022a, p. 125.

[396] See Forssén 2023b, where I refer to the preparatory works to the reform of the SBL in 1996 and to the Act on Punishment for Money Laundering: prop. 1995/96:170, p. 11 and prop. 2013/14:121, p. 115.

[397] See prop. 2013/14:121, p. 112.

laundering, disregard a convention from the United Nations (UN) which Sweden has accessed – The UN's convention against Transnational Organized Crime of 15 November 2000 (Sw., *FN:s konvention mot gränsöverskridande organiserad brottslighet av den 15 november 2000*). However, here I leave out the principle on double criminal liability to save space and refer – like in Forssén 2025a – interested readers to Forssén 2024d, when it is a matter of that principle in the present context.[398]

Regardless of the last-mentioned limitation, I would like to see, especially when prosecutors assert suspicion of tax fraud which concerns VAT together with suspicion of commercial money laundering, reasoning about crime competition in the investigations by the EBM and in criminal cases regarding asserted carrousel trading. If the enterprise that the SKV and the EBM are investigating is deemed having constituted a crime tool in carrousel trading, the investigations should contain viewpoints on whether asserted crime also shall be deemed constituting a for crime to commercial money laundering. In the investigations must – like in other cases of investigations than those of carrousel type – all three basic criteria that forms the VAT principle in Article 1(2) of the VAT Directive be regarded, that is a principally general right of deduction, reciprocity and passing on of the tax burden to the consumer as tax carrier. In my series of articles (2020–2023), where I went through the theses in the field of indirect taxes during 1994–2020, I conveyed inter alia that in the research in the field of VAT should above all the importance of regarding the right of deduction have been considered as central regardless of the choice of method in the theses, since the principle of a general right of deduction is just one of the parts of the VAT principle according to Article 1(2). Thus, the right of deduction is central for at all making a deeper reasoning on VAT in the meaning of the EU law.[399] Of course, the same must also apply in tax audits and investigations by the EBM, so that those at all can be deemed regarding VAT.

Since verdicts are passed without the mentioned respect for the subject VAT as it is determined in Article 1(2) of the VAT Directive, that is in the meaning of the EU law, those are not complying with the individual's right to a fair trial according to Article 6(1) of the ECHR. Those are based on an actual practice – an actual current law – which must be broken by decisions in the highest instances, so that current law in a true sense will become in guidance for the application of law at the courts. In other words, there is a need for precedents in the existing legal situation concerning cases where questions of tax fraud and commercial money laundering are combined in the proceedings. In that respect, the outcome of the verdicts should per definition also be deemed obviously due to gross negligence or gross mistake by the first and second instances and already for that reason should leave to appeal be decided by the highest instance.[400] Thus, the verdicts that I am considering shall not continue to confirm a for legally purposes erroneous but actually existing current law (an actual current law); those cannot in a true sense of current law be considered fulfilling the prerequisite erroneous information concerning either tax surcharge or tax fraud.[401] Thus, if Article 1(2) of

[398] See Forssén 2024d, p. 10.

[399] See Forssén 2020b, p. 744.

[400] Besides when it is of importance for guidance of the application of law with a trial in the HFD or the HD it may be so also if there are extraordinary reasons for such a trial, e.g. if the verdict in an administrative court of appeal (Sw., *kammarrätt*) or court of appeal (Sw., *hovrätt*) is due to a gross negligence (Sw., *grovt förbiseende*) or a gross mistake (Sw., *grovt misstag*). See sec. 36 first para of the FPL and Ch. 54 sec. 10 first para of the RB.

[401] To levy a tax surcharge, it must appear as clearly that a to the SKV submitted information is erroneous, which follows of Ch. 49 sec:s 4 and 5 of the SFL. The necessary prerequisites for tax fraud in sec. 2 of the SBL are:

the VAT Directive is not fully regarded in the underlying investigations can neither criminal law responsibility be placed on the individual for assertion on commercial money laundering, regardless of whether it shall be judged regarding VAT in Sweden or another Member State. In my opinion, it is namely fundamental that the imposing of responsibility also then must regard VAT according to the EU law, i.e. according to Article 1(2) of the VAT Directive.

5 The legal certainty demands leave to appeal in the HFD and the HD when the basic principles of what constitutes VAT according to the EU law is disregarded in the carrousel cases

5.1 For the individual leave to appeal on the theme of fair trial is most important

If Article 1(2) of the VAT Directive is not fully regarded in a tax audit lying as foundation to the appealed decision in the tax case it can be questioned both regarding the tax and the tax surcharge issues and the tax fraud question whether the cases in first and second instance have been tried at all regarding the subject VAT. Especially concerning the problems about whether a *missing trader* should have accounted for the amount falsely denoted as VAT in issued invoice in a special tax return instead of a VAT return it happens that the SKV, as mentioned, specify its assertions on arrangements regarding carrousel trading to the fault concerning the accounting of VAT being a matter of the entrepreneur aiming to *appropriate money from the Swedish state*. I consider that it should lead to an improved legal certainty on liability certainty if payment regarding VAT, regardless of thereby meaning real or false VAT, would be expressly exempted from criminal law liability by clarifying this in the SBL. Instead, criminal measures taken against the tax account system especially regarding reimbursements of VAT would then be addressed by instituting legal proceedings according to the general rule against frauds, Ch. 9 sec. 1 of the BrB, regardless of whether it is a matter of abusive practice.[402]

If the basic criteria of what is meant by VAT according to Article 1(2) of the VAT Directive have not been treated in a tax case or in a criminal case concerning carrousel trading and contains questions on tax fraud and/or commercial money laundering, but where the verdicts yet have been passed on the theme of VAT, there exists a need for precedents. A legally wrong but actually existing practice – an actual current law must be broken why the HFD, and the HD respectively should give leave to appeal, so that a current law in a true sense is developed and becomes of guidance for the application of law. Furthermore, the outcome of verdicts in an administrative court of appeal and a court of appeal respectively to the disadvantage of the individual has been, in my opinion, obviously due to gross negligence or gross mistake at those instances by the subject VAT not given a true analysis therein, although the verdicts in question contain the words VAT or value-added tax. Therefore, extraordinary reasons for the HFD and the HD respectively to give leave to appeal exist regarding the individuals' appeal of such verdicts by an administrative court of appeal and a court of appeal respectively.

At the mentioned oversight of the directive rule Article 1(2) and thus of what constitutes VAT according to the EU law leave to appeal is called for especially in the HD already due to it, as

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intent (Sw., *uppsåt*), erroneous information, Sw., *oriktig uppgift* (or omission to file a return etc) and risk, Sw., *fara* (of tax evasion etc.).

[402] See Forssén 2023a, sections 5 and 8 and Forssén 2024d, p. 9.

mentioned, can be questioned if even the correct criminal law legislation has been treated in the court of appeal. For the individual's legal certainty cannot Article 6(1) of the ECHR regarding the right to a fair trial be considered fulfilled either in the tax proceedings or the criminal law proceedings concerning VAT, where Article 1(2) of the VAT Directive has not been fully regarded therein and the verdicts thus cannot be deemed to have been about VAT in the meaning of the EU law. Thus, I consider that it is of importance as guidance for the application of law that precedents are established by the HFD and the HD in the present respect and would as well benefit the individual´s right to a fair trial. I am also reminding about the HFD having a special responsibility in the context by the court – like the district administrative courts and the administrative courts of appeal – being comprised by the principle of ex officio examination (Sw., *officialprincipen*) according to sec. 8 FPL and thus *have to secure that the case will examined as far as its character demands* (Sw., "*ska se till att målet blir så utrett som dess beskaffenhet kräver*").

Furthermore, I come back here, as mentioned, to the Swedish system with leave to appeal in the highest instances being criticized by Denmark as something that can lead to a parallel legal practice in Sweden compared to the EU law in the field of VAT.[403] That apprehension is well worth taking seriously and I consider that it would be a step in the right direction where legal certainty is concerned in the present respects if the HFD and the HD would take up cases as guidance for the application of law, so that the development of a for the individual unforeseeable actual current law is replaced with precisely decisions in the highest instances which thus mean a development of perceptions of current law in a true sense.

If the individual appeals to the HD or the HFD and claims concerning an interpretation question regarding a legal act like the VAT Directive, for example regarding Article 1(2), that a preliminary ruling shall be obtained from the CJEU on the matter, it follows by sec. 1 first para of *lagen (2006:502) med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol* (the Act on Certain Rules on Preliminary Rulings from the CJEU) and Article 267 third para of the TFEU that the court is obliged to state the reasons for a decision to not obtain such a preliminary ruling, where the court itself is not able to interpret the EU law.[404] In my opinion, this means that above all the HFD should take a positive attitude toward replacing an actual current law with a current law in a true sense regarding the question about a special 'VAT commission rule', which presupposes a trial in the HFD. That would benefit the legal certainty for the individuals also in cases on tax fraud and commercial money laundering that concern VAT, since the general courts thereby get guidance although the HD would not take a positive attitude, where giving leave to appeal is concerned.

5.2 The HD is actually not trying VAT fraud if the leave to appeal only regards erroneous information

In the above-mentioned case NJA 2018 p. 704 the HD made the question whether the defendant had submitted an erroneous information to the SKV in the meaning regarded in the

[403] See the CJEU's verdict of 2002-06-04 in Case C-99/00 (Lyckeskog), ECLI:EU:C:2002:329, about smuggling of goods, where according to item 11 the Danish Government criticized that the Swedish system with leave to appeal in the highest instances cause a risk of a domestic practice deviating from the CJEU's case-law. I have mentioned this also in e.g. Forssén 2019a, p. 89 and *Skatteförfarandepraktikan – med straff- och europarättsliga aspekter: Andra upplagan* (the Taxation Procedure handbook – with criminal law and European law aspects: Second edition), self-published 2019, Forssén 2019g, section 10.4.

[404] See also Forssén 2019f, p. 36.

SBL, by for the defendant's own company having claimed deduction for input tax, to the sole question on the theme of tax fraud and declared the question leave to appeal pending concerning the case as for the rest. The HD concluded that the company's claim of deduction meant that an erroneous information had been submitted according to sec. 2 of the SBL. The question in the leave to appeal would be answered in pursuance of it. The HD deemed that reasons were lacking to give a leave to appeal concerning the rest of the case. Thereby, the HD considered that the court of appeal's verdict would stand good.

In Forssén 2022a, I have criticized the HD's mentioned limitation of the leave to appeal in NJA 2018 p. 704. Above all, I set the senior judge of appeal's perception that the defendant should have been acquitted with regard to the criminal law principle of legality in relation to the HD's remark about the question on intent not being comprised of the leave to appeal. Thereby, I concluded, as mentioned, that it is not clear that abusive practice *in itself* means that criminal law responsibility exists. Furthermore, I stated that it in the individual case always shall be decided whether also the risk prerequisite for tax fraud is fulfilled. I reminded about this, since the HD neither treated the risk prerequisite within the frame of the leave to appeal.[405]

In the tax audits lying as grounds for tax cases as well as for criminal cases on the theme of tax fraud of carrousel type, the SKV omits, in my experience, that the Advocate General in the Opinion in Joined Cases C-131/13, C-163/13 and C-164/13, as mentioned, considers that a trader even may not be aware of participating in such a fraud and acting in good faith. Therefore, I repeat my criticism of the HD in NJA 2018 p. 704 limiting the leave to appeal to only regard the prerequisite erroneous information. In fact, by that limitation a trial is not conducted of the question on tax fraud according to sec. 2 of the SBL on the theme of VAT fraud, regardless of whether a case concerns VAT fraud of carrousel type or any other case of asserted VAT fraud. Thus, I consider that NJA 2018 p. 704 has a limited importance as guidance for the application of law on the theme of tax fraud. Thus, the HD has every reason to give leave to appeal in that respect and the need for this does not become less by the prosecutors not seldom completing the description of the deed with assertions on commercial money laundering.

5.3 A continued unclear legal situation is to the detriment of both the legal certainty and public treasury

If the legal situation is not clarified in the respects mentioned by this work, it is not only negative for the individuals, but it will in the long run also be detrimental to public treasury. In the latter respect, I may mention that I finished my lecture in 2001 (see Forssén 2001) with verdicts meaning that the SKV and the EBM gain a hearing for their viewpoints in cases of carrousel trading without support in current law in a true sense leads to problems for the SKV and the prosecutors once new guidance is given by decisions in the HFD and in the HD. Then, fraudulent enterprises may have adapted to a misdirected actual current law, and the defenders can ask the simple question if the law did not apply in previous verdicts in the first and second instances of the administrative courts and the general courts. It will become a legal morass, where the State loses tax revenues that should belong to public treasury. Thus, the arguments which normally apply as motives for a restrictive application of the prerequisite extraordinary reasons concerning leave to appeal on for instance the grounds of gross negligence or gross mistake becomes for the here mentioned cases instead precisely arguments for the HFD and

[405] See Forssén 2022a, p. 125.

the HD ought to give the individual leave to appeal on those grounds at the individuals' appeal of a verdict by an administrative court of appeal or of a verdict by a court of appeal.

6 Comprehensive conclusions on the existence of a special 'VAT commission rule'

The SKV publishes inter alia its standpoints in various taxation questions on its website (www.skatteverket.se), under *Rättslig vägledning* (Legal guidance). Thereby, the standpoints form part of an administrative practice which is binding for the civil servants at the SKV , but if an opposite viewpoint follows by current law according to the tax legislation or interpretations which forms case-law by decisions from the HFD or the CJEU the SKV and the civil servants there – like everyone else – obligated to follow current law, instead of the SKV's administrative practice. The issues that I bring up in this work concern a case regarding VAT, where what I name an actual current law can exist at the SKV – in the form of administrative practice – or at the district administrative courts and the administrative courts of appeal, which in practice is applied when current law in a true sense, that is in the form of case-law from the HFD or the CJEU, is not available for a present VAT question. I have chosen to bring up the question on the existence of an actual current law concerning the by the SKV (and the EBM) asserted special 'VAT commission rule" for my reasoning about legal certainty in cases on VAT and connected questions in Sweden. What is especially interesting with this case is that the SKV, as above-mentioned, in its standpoint of 2020-09-25 has made a brief addition on 2023-05-31, where the SKV states that its legal judgment remains also after the GML being replaced by the ML on 1 July, 2023. Thus, the addition contains no analysis of the questions by the SKV, why I am going through how the perception on the existence of an actual current law which deviates from the VAT Directive in the present respect can undermine the legal certainty for the individual entrepreneur about VAT and connected questions in Sweden.

The perception at the SKV (and the EBM) on the special 'VAT commission rule' in Ch. 6 sec. 7 of the GML has been that it means that a middleman – like an agent – is comparable with a trader, although not having an agreement on commission trading in a civil law sense with the mandator. Then, an ordinary agent shall account for VAT on a taxable amount corresponding with the gross amount received from the purchaser of the goods or the services mediated, instead of only on the commission that the agent keeps as income. I consider that the VAT reform on 1 July, 2023 has meant that this does not apply anymore. By the introduction of Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML an adaptation is made to the Articles 14(2)(c) and 28 of the VAT Directive, so that it no more exists any such special rule – 'rubber rule' – as both the authorities have claimed. Therefore, it is for reasons of legal certainty important that it will not be established as an actual current law that a special rule in the form of a special 'VAT commission rule' would exist meaning that the middleman shall be viewed as a trader also in other cases than commission trading in a civil law sense. Such an actual current law can be established by the SKV's addition on 2023-05-31 in its standpoint of 2020-09-25 meaning that the ML does not cause the SKV's legal judgment to be altered. To avoid legal uncertainty concerning whether the special 'VAT commission rule' can be considered applying according to the SKV's administrative practice, a clarification should be made in section 3.2 of the SKV's standpoint of 2020-09-25, *Förmedling av tjänster i eget eller i annans namn, mervärdesskatt* (Intermediation of services in one's own or somebody else's name, value-added tax), so that there will not be any hesitation about current law in a true sense in the form of the ML means that it nowadays is requested that an agreement on a commission trading in a civil law sense exists for a middleman to be compared for VAT purposes with a trader. In section 3.2 of the statement, the SKV refers to Ch. 6 sec. 7, that is

to that rule in the GML, and states that it means that the intermediary of goods is treated *in the same way as a retailer of the goods* (Sw., ”*på samma sätt som en återförsäljare av varan*”). By the addition of 2023-05-31 in the standpoint, I perceive that the SKV considers that the special ’VAT commission rule’ still applies, why current law in a true sense as it is expressed by the ML demands the mentioned clarification by the SKV.[406]

In my project with a review of the theses in the field of indirect taxes during 1994–2020, I stated concerning the research in the field of VAT above all the importance of regarding the right of deduction in theses should have been central regardless of the choice of method. This with respect of the principle of a general right of deduction being one of the basic criteria of the VAT principle according to Article 1(2) of the VAT Directive. In other words, the right of deduction is central for at all being able to make deeper reasoning about VAT in the meaning of the EU law. Here, I by and large leave out the mentioned review of the theses but emphasize precisely the mentioned importance of the VAT principle, where it is a matter of judging whether tax audits by the SKV and investigations by the EBM at all can be deemed regarding VAT in the meaning of the EU law. If the SKV and the EBM consider that enterprises they are investigating shall be deemed having constituted a crime tool in for instance a VAT fraud of carrousel type, the legal certainty demands that the investigations – as in other cases of investigations than such concerning asserted carrousel trading – contain an analysis covering all of the three basic criteria for the VAT principle in Article 1(2). That is, an acceptable analysis shall regard the criterion of a principally general right of deduction, the reciprocity principle and that the VAT shall be passed on to the consumer as tax carrier.[407]

As far as my experience goes, it would be hard to find an equally complex VAT question as the present one about whether or not a special ‘VAT commission rule’ has existed in Swedish VAT law and, if so, whether or not it still remains as an actual current law after the Swedish VAT reform of 2023. Therefore, in the following I bring up with regard to that rule the theme of criminal law consequences of an actual current law in relation to the very complex issue regarding prosecution, where suspicion on tax fraud by VAT fraud of carrousel type is combined with prosecution on suspicion of commercial money laundering.[408] Before going further with procedural and legal certainty aspects in that respect, I end this section with some remarks, in relation to the Advocate General’s Opinion in Joined Cases C-131/13, C-163/13 and C-164/13 and the Danish Government’s criticism according to item 11 in Case C-99/00 of the Swedish system with the demand of leave to appeal in the highest instances, to emphasize the need for precedents abolishing assertions on the existence of a special ‘VAT commission rule’ as an actual current law.[409]

In the Opinion in Joined Cases C-131/13, C-163/13 and C-164/13, the Advocate General stated that it occurs in cases of carrousel trading that ordinary businesses are used, with or without their knowledge, and that some traders even may be in good faith about being part of a transaction chain where VAT fraud of carrousel type occurs. For the individual, the question of mala fide or good faith is central in the investigations and cases that the SKV and the EBM are conducting about carrousel trading. The question of a continued actual current law

[406] See section 2.

[407] See sections 3.3.1 and 4.2.

[408] See sections 3.2, 3.3.2.3 and 4.2.

[409] See sections 3.1 and 5.1.

meaning that the special 'VAT commission rule' still opens for the possibility to expand the liability of payment to apply also for middleman situations which are not constituting commission trading in a civil law sense is conclusive concerning the legal certainty for inter alia ordinary agents. This already due to an application of such a special rule meaning an unexpected raise of the taxable amount.[410] The need for precedents in the HFD as well as in the HD concerning questions about carrousel trading based on such an actual current law is also shown by the risk of a parallel legal practice emerging compared with the EU law. This is also something that the Danish Government – according to item 11 in Case C-99/00 – has noticed as a risk following by the Swedish demand of leave to appeal in the highest instances. If an actual current law may be developed at the SKV and the first and second instances of the courts there will quite simply not come up any decisions in the HFD and the HD, that is perceptions of current law in a true sense will not be developed inter alia regarding cases of carrousel trading.[411]

7 Further procedural and legal certainty aspects

7.1 The Swedish Bar Association's responsibility for the legal certainty in criminal cases on carrousel trading

From a procedural perspective of importance inter alia in criminal cases on carrousel trading, I consider that the Swedish Bar Association should complete its *Vägledande regler om god advokatsed*, Guiding principles of professional conduct for lawyers (abbreviated VRGA), namely in the rule 5.4 (*Vilseledande uppgifter* – Misleading information).[412] There it is stipulated that *a lawyer must not mislead the opposite party by regarding actual circumstances or the content of a legal rule presenting information which the lawyer knows is erroneous* (Sw., "*en advokat får inte vilseleda motparten genom att om faktiskt förhållande eller innehållet i rättsregel lämna uppgift som advokaten vet är oriktig*"). In the adjoining commentary, it is inter alia stated that *the rule is only aiming at the lawyer's knowledge* (Sw., "*regeln tar sikte endast på advokatens vetskap*". The rule means that the lawyer must not mislead about facts or about the content of a legal rule but is at the same time considered meaning that the lawyer shall not be didactic. This means that the lawyer is not considered acting in conflict with the VRGA, if he or she is not taking the prosecutor out of a misunderstanding of the meaning of the rules in the ML and the SFL. Taken by itself, the Bar Association decided on 13 June, 2024 about introducing – with the coming into force of 14 June, 2024 – the rule 2.1.3 in the VRGA, which – according to its headline – means that a lawyer must not take a case if he or she is lacking the competence and experience that the case requires. In the commentary to the rule, inter alia the following is stated: *several jurisdictions have rules of ethics that emphasizes the importance of lawyers' competence when they are taking on cases. In The Council of Bars and Law Societies of Europe (CCBE) and its Code of Conduct, it is also emphasized that a lawyer should not handle a matter which the lawyer knows or should know that he or she is not competent to handle without co-operating with a lawyer having the necessary competence* (Sw., "*Flertalet jurisdiktioner har*

[410] See sections 3.1 and 5.2.

[411] See section 5.1.

[412] See *Regler för advokatverksamhet, femte upplagan* (Rules on the Role of Lawyers, fifth edition) from January 2025, section I, *Vägledande regler om god advokatsed* (Guiding principles of professional conduct for lawyers). See https://www.advokatsamfundet.se/Nyhetsarkiv/2025/juni/regler-for-advokatverksamhet-har-uppdaterats/ (visited 2025-07-24).

etiska regler som betonar vikten av advokaters kompetens när de åtar sig uppdrag. Även i den europeiska sammanslutningen av europeiska advokatsamfund, CCBE, och dess Code of Conduct, framhålls det att en advokat inte bör hantera ett ärende som advokaten vet eller borde veta att han eller hon inte är kompetent att hantera, utan att samarbeta med en advokat som har den nödvändiga kompetensen"). The problem is only that the lawyer appointed by the district court as public defender or private defender seldom has the necessary competence in the subject VAT law and should seek the required co-operation in that respect outside the community of lawyers. Time will show whether matters will be treated in the Bar Association's disciplinary board about lawyers' setting aside in the present respect of the rule 2.1.3 of the VRGA. However, the problem that I am bringing up here concerns that although the defence lawyer has required VAT competence himself or herself or acquires it by co-operation – with other members of the Bar Association or tax law competent business lawyers or economists at the accounting firms – he or she is not considered having a didactic role.

Thus, those involved in the proceedings might reason in a complex criminal case – like concerning alleged VAT fraud of carrousel type – without regarding the VAT principle according to the EU law. If the lawyer realize that the prosecutor has missed in the description of the deed what VAT is according to the EU law or does not have any cover otherwise for the prosecution according to the rules in the ML or the SFL he or she should take a didactic role as soon as possible, rather already at the preliminary investigation so that a decision of prosecution can be avoided. As far as my experience goes, it is hard to come in as an adviser trying to get the proceedings right regarding the VAT rules when it already has gone on for a long time at the district court or even has reached the court of appeal. The counter-argument from the prosecutor will not seldom be that the client and defender are doing a reconstruction after the event, when an expert is consulted and testifies about precisely the meaning of current law. An even worse situation which I have also experienced is being consulted in the court of appeal as assistant to the defender, but the evidence is not allowed to be examined again since the main part of the proceedings nowadays shall be conducted in the district court and another round of questioning therefore will be dismissed in the court of appeal. In the court of appeal, it will only be a matter of listening to video recordings of questionings from the district court that seems ineffective for the correct investigation of the cause. It did not matter that the prosecutor afterwards told the defender that my statement was interesting, whereby no sarcasm was intended but the comment by the prosecutor was perceived by the defender as honestly meant. The principle *jura novit curia* (the court knows the laws) is neither helping on the theme of fair trial, if not either the district court or the appeal court are competent in VAT law. Often, the convicted does not understand anything of what he or she has experienced in the courts, which more than I should see as a legal certainty problem on the theme of fair trial.

I consider that it is not to work as a defender in a criminal case regarding carrousel trading by just being gifted about what is to be found in the protocol of the preliminary investigation. In the first place, it is a matter of emphasizing precisely this on behalf of the clients who have a real activity and not only have hired an enterprise occurring as warehouse in several investigations, but which is not accepted by the SKV as a real warehouse enterprise, to distinguish the client from those consulting such enterprises to move goods around in so to speak a carrousel. If the defenders do not use such arguments and evidence to present counter-arguments in the form of an alternative scenario on the theme of seriousness to the prosecutor's conventional assertions which basically are building on a report from the SKV where the arguments for the client being in good faith regarding that the client's enterprise occurred in a VAT fraud of carrousel type, it means in practice that the defender is

disregarding that the Advocate General in the Opinion in Joined Cases C-131/13, C-163/13 and C-164/13, as mentioned, considered that a trader can be unaware of participating in such a fraud and be acting in good faith. Then, the defender is only confirming the SKV's preconceived idea that them dealing with electronical products would be considered having an enhanced duty of examination and that they are in bad faith (mala fide) etc. In practice, this means that the defender is helping a prosecutor who states an ill-founded deed description to gain a hearing by the court, and the fact that nobody in the court is regarding that the defendant can have been in good faith means not only that he or she is not given a fair trial according to Article 6(1) of the ECHR but even that the so-called presumption of innocence in Article 6(2) being disregarded.[413]

Unless an alternative scenario is presented when this is possible it does not matter for the defender to pick around in the protocol of the preliminary investigation – which sometimes can comprise thousands of pages – to find a *smoking gun* concerning some detail on who have had the right to attest or not in the enterprise. That is really playing on the prosecutor's piano if the defenders in connection with cases of more than one prosecuted in an enterprise devote themselves to get the clients to blame each other. Concerning the question where I and Stig von Bahr have different opinions on whether abusive practice can be comprised by criminal law consequences, I state the following for the context. I deem that a legal objection from the defender with support of von Bahr 2022 can backfire for the defender's client if the prosecutor and the court are aware of NJA 2018 p. 704, as I mention above, means – with regard to the statements by the senior judge of appeal in the Svea Court of appeal – that it is not clear that abusive practice *in itself* cause that criminal law responsibility exists, but that this *can* the case. Therefore, I consider, as also mentioned, that it is not far-fetched that it can exist other criminal law questions than tax fraud in a case of abusive practice, like above all suspicion of commercial money laundering. In Forssén 2023d, I come back to Forssén 2022a and von Bahr 2022 and state that although I do not agree with von Bahr in the present respect he should be called as an adviser by the defence to support a legal objection meaning that abusive practice never can cause criminal law consequences. Then, in case of a report to the Bar Association's disciplinary board on the theme of misleading by the lawyer, the board may ponder over what has happened in relation to the rule 5.4 of VRGA.[414]

With regard to these aspects on how criminal cases in the present situations can become ineffective on the theme of current law concerning the VAT, I consider that the Swedish Bar Association as soon as possible should complete the rule 5.5 in the VRGA, so that it will not constitute an obstacle in practice for the correct investigation of the cause in criminal cases which concern questions regarding alleged VAT fraud of carrousel type. Thus, the Swedish Bar Association also has a responsibility for those involved in the proceedings of criminal cases shall contribute to the legal certainty in cases which basically regard asserted carrousel trading. The Swedish Bar Association should take that responsibility for the monopoly for the members in criminal cases shall continue to be motivated also in such cases. Otherwise, I consider that the monopoly should be abolished or modified for the benefit of at least the present questions.

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[413] Regarding the principle of innocence: see also Article 48(1) of the Charter of Fundamental Rights of the European Union and Article 11(1) of the UN's Universal Declaration of Human Rights. See in the latter respect the website of the UN Association of Sweden (*Svenska FN-förbundet*): https://fn.se/vi-gor/vi-utbildar-och-informerar/fn-info/vad-gor-fn/fns-arbete-med-manskliga-rattigheter/den-allmanna-forklaringen-om-de-manskliga-rattigheterna/ (visited 2025-07-26).

[414] See also Forssén 2025a.

7.2 Extraordinary reasons in the SFL for release shows a need for trials in the ECtHR

If extraordinary reasons exist release can be given completely or partly from tax deduction (Sw., *skatteavdrag*), employer's contribution for social security purposes (Sw., *arbetsgivaravgifter*), value-added tax (Sw., *mervärdesskatt*) or excise duty (Sw., *punktskatt*), which follows of Ch. 60 sec, 1 first para nos. 1 and 2 of the SFL. An application for release is submitted to the SKV, which pass its judgment according to Ch. 13 sec. 12 of *skatteförfarandeförordningen* (2011:1261, the Taxation Procedure Regulation). The decision can be appealed to the government according to Ch. 67 sec. 6 second para of the SFL if the SKV refuse the application of release. If release is given it may also be given for demurrage (Sw., *förseningsvavgift*), tax surcharge (Sw., *skattetillägg*) and interest (Sw., *ränta*).[415]

In an article from 2018, I brought up the release institute in question of the SFL.[416] Then, I mentioned inter alia that the legislator considers that it is the vendor who according to Ch. 60 sec. 1 of the SFL can apply for a release from charging and paying output tax on the sales, and that this is clearly established by the preparatory works to the nearest predecessor to that rule, that is the preparatory works to Ch. 13 sec. 1 of *skattebetalningslagen* (the Tax Payment Act). I mentioned that it is stated there that with such extraordinary reasons that might cause *release from payment of VAT cannot be considered cases where the tax liable has charged the tax to his or her customers* (Sw., "*befrielse från betalning av mervärdesskatt kan inte anses fall då den skattskyldige har tagit ut skatten av sina kunder*").[417] Thus, a purchaser's application for release from paying input tax is dismissed by the SKV and the government.[418].

I referred to Forssén 2018 in an article from 2024,[419] where I on the theme of legal certainty iterated that the circumstance of the SKV considering that the institute of release according to Ch. 60 sec. 1 of the SFL only can regard output tax and not input tax means a *gap* (Sw., "*lucka*") exists in the field of VAT, where available legal remedy is concerned in that respect.

Here, I reiterate that the legal certainty gap appears by the lack of a general right to court trial in Sweden. That conflicts with the principle on access to court in Article 6 of the ECHR. I stated that this could have been solved in connection with the reform in 2010 of the RF, but it was not done. A direct connection to the ECHR was dismissed. I mentioned that it has been brought up by professor Wiweka Warnling-Nerep (nowadays Warnling Conradsson) in a book of hers from 2015.[420] In Forssén 2024e, I stated that if the SKV issues a negative decision in a case on release according to Ch. 60 sec. 1 of the SFL and it would be confirmed by the Government the individual could apply at the HFD for a law trial according to sec. 1 of *lag (2006:304) om rättsprövning av vissa regeringsbeslut* (the Act on Law Trial of Certain

[415] See Ch. 60 sec. 1 second para of the SFL.

[416] See Forssén 2018c.

[417] See prop. 1996/97:100 Part 1, p. 596. See also Forssén 2018, p. 4.

[418] See Forssén 2018, p. 4.

[419] See Forssén 2024g.

[420] See Warnling-Nerep 2015, pp. 31, 42 and 43. In Forssén 2024g, I also mentioned that I concerning the present question referred to Warnling-Nerep 2015 in Forssén 2019f, p. 16 too.

Government Decisions). Thereby, I noted in that respect that rule in question refers precisely to Article 6(1) of the ECHR.

In Forssén 2018, I stated that it is not obvious that the CJEU would confirm the perception that release due to extraordinary reasons according to Ch. 60 sec. 1 of the SFL only can apply to output tax and not to input tax is the only valid one. In Forssén 2024e, I extended my proposal insofar that I am stating that another *gap* also should be addressed by the legislator in the same respect, namely whether what I denote as false VAT can be comprised of the concept *mervärdesskatt* (value-added tax) according to Ch. 60 sec. 1 of the SFL. In Forssén 2024e, I brought up that the application of extraordinary reasons according to the institute of release in Ch. 60 sec. 1 of the SFL is one of the questions on the theme of measures against VAT frauds of carrousel type that remains to be treated after SOU 2024:32. Inter alia, I stated that the institute of release in the SFL should resolve the problem with a lack of a general right to court trial in Sweden.

Thus, I state above all that tax cases or criminal cases concerning VAT should be brought up by the ECtHR if the individual files an application there after exhausted possible remedy in Sweden. To support this, I refer to my legal certainty aspects of above and emphasize the reform in 2010 of the RF did not mean that a direct connection to the ECHR was implemented. The ECHR only has the position as ordinary law in Sweden.[421] Therefore should, when courts handle VAT but by and large are missing an analysis of present questions setting out from what is meant by VAT according to the EU law, that is according to Article 1(2) of the VAT Directive, a trial of the support for the State's measures against the individual be made on a constitutional level. If a trial of the present sort of cases cannot be taken so to speak all the way to the ECtHR, I judge it as pointless with respect of legal certainty for the individual that the fundamental rights according to the ECHR are included by the EU law as general principles.[422] That a European law procedural overall view is motivated here, I consider as confirmed by the following. According to sec. 4 of *förvaltningslagen (2017:900*, the Administration Act, abbreviated FL) the FL is subsidiary in relation to special statutes like the SFL. In the preparatory works to *lag (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen* (the Act concerning Sweden's accession to the European Union) in 1995, it is taken by itself stated *there are no EC rules on how a Member State shall organize its administration* "*att det inte finns några EG-regler för hur ett medlemsland skall organisera sin förvaltning*".[423] However, the Administration act investigation (Sw., *Förvaltningslagsutredningen*) which led to the FL stated that Sweden's EU membership in 1995 and the implementation at the same time of the ECHR into Swedish law raise new demands on the administration legislation and that it would be good to make easier the interaction with the EU law if the deviations are not too large.[424] In Warnling-Nerep 2015, it was also mentioned (p. 181) that the Administration act investigation had a general European law perspective concerning what should be considered at new legislation.[425]

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[421] By SFS 1994:1219 the ECHR and inter alia its Protocols nos. 1 and 7 was implemented as law – not constitutional law – in Sweden on 1 January, 1995. See also Forssén 2019f, p. 17.

[422] See Article 6(3) of Treaty of European Union, abbreviated TEU.

[423] See prop. 1994/95:19 Part 1, p. 453. See also Forssén 2019f, pp. 10 and 18.

[424] See SOU 2010:29, *En ny förvaltningslag* (A new administration act), p. 21. See also Forssén 2019f, p. 19.

[425] See also Forssén 2019f, p. 19.

The investigation *Åtgärder mot mervärdesskattebedrägerier* (Measures against VAT frauds) – i.e. SOU 2023:49 and SOU 2024:32 – mentioned carrousel trading and legislation was supposed to be introduced on 1 July, 2025 but – as mentioned – this did not happen. However, in the recently mentioned administration law respects, it is of interest that SOU 2024:32 mention (on p. 92) that in Finland has recently a special development taken place of registration control, where a tool is used for risk evaluation of enterprises and transactions based on an advanced system of points. It has led to the accuracy being gradually increased at the tax authority's control of reimbursement of VAT. To avoid the risk of developing a parallel legal practice compared with the EU law, I suggest that Sweden should co-operate with Finland so that a common administrative practice is developed especially for the taxation procedure. Hopefully, my article in the JFT of 2025 with ideas for tools based on artificial intelligence (AI) may give impulses to such a co-operation between Sweden and Finland.[426] I consider that it on the whole exists a need of more research in Sweden on the taxation procedure and refer for inspiration of those interested in for instance Finland and Sweden to what I mention in that respect on my website.[427]

7.3 A special question on a new trial regarding criminal cases about carrousel trading

Finally, another legal certainty question than the questions on precedent value or extraordinary reasons for leave to appeal in the HFD (see sec. 36 first para of the FPL) and in the HD (see Ch. 54 sec. 10 first para of the RB) respectively and the question about extraordinary reasons for application of the release institute in Ch. 60 sec. 1 of the SFL concerns a rule in the act on introduction of the BrB, namely sec. 5 second para second sen.[428] In Forssén 2024b (p. 329), I state that it that rule in the BrP follows that if another law act applies *when verdict is announced that act shall be applied, if it leads to freedom from punishment or a mitigated punishment* (with the exception for *a deed which was punishable during a certain time due to then existing special reasons*). Regardless of whether the SKV – and the EBM – would be considered having support for their viewpoint about the existence of a special 'VAT commission rule' in older Swedish VAT law, I consider, as mentioned, that the VAT reform of 2023 nevertheless has meant that anything like that does not apply anymore, according to Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML. Set out from this conclusion, I consider that if the EBM in an investigation concerning time before 1 July, 2023 has invoked the special rule in question regarding what is meant by commission trading with respect of VAT the general courts cannot pass sentence against the individual in such a case on 1 July, 2023 or later for tax fraud or coarse tax fraud according to sec. 2 or 4 of the SBL.

Thus, I repeat here that the question arising for some time to come is whether the general courts will be able to treat the question on the change of current of law in question due to the introduction of the ML also regarding the principle of freedom from punishment that follows of sec. 5 second para second sen. of the BrP. Can that question even come up in cases on a new trial? According to Ch. 58 sec. 2 no. 6 of the RB can a new trial be granted for the benefit of the defendant if *the application of constituting grounds for the verdict obviously conflicts*

[426] See Björn Forssén, *Juridik och teknologi – idéer för AI-verktyg till momsgranskningen i Sverige* (Law and technology – ideas for AI-tools to the VAT investigation in Sweden), JFT 1/2025, pp. 31–64 (Forssén 2025b).

[427] See https://forssen.com/forskning/f14/. Regarding my ideas on AI, see also https://forssen.com/forskning/f30/.

[428] See sec. 5 second para second sen. of the BrP.

with an act (Sw., ”*den rättstillämpning som ligger till grund för domen uppenbart strider mot lag*”). I even question whether the SBL is the applicable act, where an alleged criminal practice concerning real or false VAT is tried regarding carrousel trading and such a practice is directed towards the tax account system itself, whereby the trial of criminal law responsibility thus not concern in the first place whether erroneous information has been submitted in a VAT return. In such a case, I consider that legal proceedings should instead have been taken based on the general rule against fraud, Ch. 9 sec. 1 of the BrB, regardless of whether it is a matter of abusive practice.[429] Although the judiciary system should not be unnecessarily burdened with new trials, I consider that the lack of knowledge that is significant for both judges and others involved in the proceedings in cases on VAT frauds of carrousel type, where the basic criteria for what is meant by VAT according to the EU law (i.e. according to Article 1(2) of the VAT Directive) is concerned, makes it counterproductive for the confidence in the judiciary system by the general public if a petition for a new trial would not be granted in above all a suchlike case. This is also of interest in connection of verdicts of guilty regarding tax fraud or coarse tax fraud passed before the VAT reform of 2023.

8 Tips for future research efforts regarding the problems with ’VAT carrousels’

[Note: This section is replacing the last section in Forssén 2025a, which also concerned further research, why the end of Chapter VIII. of this book has no section 14. Instead, below I suggest some research efforts in connection to the legal certainty matters of this chapter.]

Especially with regard to the problems on ‘VAT carrousels’ and commercial money laundering, where criminal matters of VAT fraud of carrousel type are combined with commercial money laundering – and often book-keeping crime too – I suggest the following research efforts to be made after the government’s investigation on measures against VAT fraud, i.e. after the government’s reports SOU 2023:49 and SOU 2024:32.

The government did not succeed with the recently mentioned reports, since intended new legislation to solve the problems with the phenomenon of ‘VAT carrousels’ was not introduced as supposed by the legislator on 1 July, 2025. Therefore, I propose that researchers should help the legislator in Sweden to make a tax reform, where the VAT would be replaced by a gross tax, which of course is a project that must be confirmed at the EU level. However, after the rather ineffective efforts since the beginning of the 2000’s by the introduction of reverse charge for various problematic situations and the last failure of the government trying to take measures against VAT fraud with the reports SOU 2023:49 and SOU 2024:32, I suggest the mentioned reform as a part of a great tax reform in Sweden, which I wrote about in the JFT already in 2024.[430] This is the only way to eliminate the problems with fraudsters appropriating money from the State, since gross taxes unlike VAT do not contain any right of reimbursement of input tax.

Regardless of whether such a tax reform would be introduced, I am urging researchers from various academic disciplines working with issues on collection of tax to put much effort into

[429] See section 5.1.

[430] See Björn Forssén, *Förslag till en stor skattereform i Sverige som också förbereder en EU-skatt* (A proposal for a great tax reform in Sweden which also is a preparation for an EU tax) JFT 5–6 /2024 pp. 455–496. (Forssén 2024h).

the question of control at the SKV's registration of enterprises for taxation purposes. In that respect, I hope to inspire interested researchers with my reflections on the registration matter given e.g. in Forssén 2021b (see *ANNEX 3*) and in Forssén 2025b (see section 7.2).

For future efforts on the theme of measures against 'VAT carrousels', researchers should of course regard that the suggestions by the government's reports SOU 2023:49 and SOU 2024:32, which were supposed to lead to legislation on 1 July, 2025, did not do so but also that neither the report SOU 2020:13 led to the suggested criminalization of transgressions of EU-regulations.[431] Especially for VAT issues, this is a difficult problem to resolve with regard to the competence being conferred to the EU and its institutions concerning VAT but still remains at the Swedish parliament also after Sweden's EU-accession in 1995. If this book is saying anything at all on the theme of legal certainty, it is that the present situation must be examined more by researchers to influence the Swedish judiciary system so that it can be deemed e.g. passing verdicts which fulfil the demand on VAT fraud of a carrousel type being proven beyond reasonable doubt. This demand for legal certainty is not only of importance for the individuals but also for the public treasury, which I – as above-mentioned – emphasized when finishing my lecture at Swedish Law Meeting already in 2001. Nowadays, I advise the legislator as well as the researchers thinking about measures against VAT fraud to consider in the context of 'VAT carrousels' also that the EU may according to Article 83(1) of the TFEU issue directives establishing minimum rules concerning "the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting", where money laundering is one of the areas enumerated but not VAT fraud. Nevertheless, the problems regarding 'VAT carrousels' should be approached by considering the possibility for the EU to issue such a directive and in that respect also The UN's convention against Transnational Organized Crime of 15 November 2000. See also chapter VI., section 7, where I mention this convention and that Sweden joined the EPPO in 2024.

In this chapter, I state inter alia that the problems with an actual current law on particularly the 'VAT commission rule' is procedural,[432] which I consider urges the courts to closely follow continued deepened research in the present respect so that it will be replaced by current law in a true sense for the benefit of foreseeable decisions and thus promoting legal certainty. In the context of law of procedure, I also propose that the legislator follows the development of suggested research efforts from a constitutional perspective too. In that respect, I may also mention one of my articles from the time before my series of articles during the period of 2021–2025 concerning the subject of 'VAT carrousels' and commercial money laundering, namely one of my articles in the Balans from 2017.[433] In Forssén 2017c, I presented my idea of a norm hierarchy at rule competitions between Swedish national and European law rules which I name the European stepladder, and I suggested that law of procedure should be considered in research within the field of VAT as long as the principle of the EU law's precedence before national law is not codified.[434] In my opinion, it would be helpful also at further research with regard to the present subject on measures against VAT fraud.

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[431] See chapter I., section 4, chapter IV., sections 4.2 and 8.2 and chapter VI., section 5.

[432] See section 3.2.

[433] See Björn Forssén, *Europatrappan – En normhierarkisk bild vid regel- konkurrens mellan svenska nationella och europarättsliga regler med skatterättsexempel* (The European stepladder – a norm hierarchy image at rule competitions between Swedish national and European law rules with taxation examples), Balans 4/2017 pp. 15–19. (Forssén 2017c).

[434] Until then, that principle follows of the CJEU's case-law – since Case 6-64 (Costa), ECLI:EU:C:1964:66.

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