Falsely charged VAT causes liability of payment – not tax fraud – the ’carrousel’ goes on

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DEBATE – by Björn Forssén, Member of the Swedish Bar Association and Doctor of Laws.

In two previous debate articles in *Dagens Juridik* (Today’s Law), ”*Livsmedelspriserna föranleder lagändringar och planering avseende indirekta skatter*” (The prices of foodstuffs cause law alterations and planning regarding indirect taxes), 2023-03-15, and ”*Näringspenningtvätt i momskarusell*” (Commercial money laundering in VAT carrousel), 2023-10-02,[1] I have referred to my article in *Svensk Skattetidning* (Swedish Tax Journal) no. 2/2022 (pp. 118-130), ”*Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704*” (VAT frauds of so-called carrousel type and NJA 2018 p. 704),[2] where I reason set out from that case in *Högsta domstolen* (HD), the Supreme Court, when it is a matter of whether tax fraud can exist in cases of abusive practice in ”VAT carrousels”. Due to a verdict of *Svea hovrätt*, the Svea court of appeal, of 2023-11-07 (case no. B 15272-22), I follow up in this article the tax fraud question with the question whether tax fraud can be deemed existing regarding an amount that has been falsely denoted as value-added tax (VAT) in an invoice, i.e. for an amount that does not constitute VAT according to the general rules in the VAT act, but which still causes liability of payment to *Skatteverket* (SKV), the tax authority, for the issuer of the invoice (as long as a credit note is not issued) and which I denote *oäkta moms*, i.e. false VAT.

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

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

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

[2] See Chapter I.

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

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

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

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

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

In *Tidningen Balans* (The Periodical Balans), I have developed in an article, *Skenfaktura med momsdebitering – konsekvenser för skatt och redovisning* (Fictitious invoice with charging of VAT – consequences for tax and accounting),[3] which was published on 2023-06-13 under *Fördjupning* (the Annex with advanced articles) on www.tidningenbalans.se, what consequences may occur for issuers and receivers of a fictitious invoice with charging of VAT, i.e. an invoice containing an amount that I denote false VAT. Also there, I state that the receiver can be comprised by tax fraud according to sec. 2 of the SBL, but not the issuer. The issuer shall, according to Ch. 26 sec. 7 of *skatteförfarandelagen (2011:1244)*, SFL, the Taxation Procedure Act, account for the amount in a special tax return to the SKV – not as regarding real VAT in a VAT return (see Ch. 26 sec. 21 of the SFL). That false VAT is not VAT according to the GML means that the issuer of the invoice has not committed a crime regarding *skatt* (tax), i.e. tax fraud according to sec. 2 of the SBL. For that it would take a clarification in the SBL meaning that with *skatt* (tax) is also meant an amount falsely denoted as VAT in an invoice. The prosecutor is making an invalid reasoning when doing the mentioned addition to the deed description. The special rule on liability of payment is not subsidiary to the main rule on tax liability in Ch. 1 sec. 1 first para no. 1 of the GML, why the Svea Court of appeal should have disqualified that the invoices *at least* meant falsely charged VAT according to Ch. 1 sec. 1 third para of the GML. Rigged legal actions is an example of application of the special rule (see prop. 2007/08:25 p. 91), and whether such or real business transactions have occurred constitute a rule competition between the special rule and the main rule. The prosecutor cannot guard with: if not the one applies, *at least* the other do.

If the Svea Court of appeal's verdict of 2023-11-07 is appealed, I deem that the HD should give a leave to appeal, at least concerning the items of prosecution which regard issuers of invoices with of the prosecutor asserted falsely charged VAT or remit the case to re-trial.[4]

[3] See Chapter II.

[4] 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).