’VAT carrousels’ and the alteration of the special intermediation rule

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

In *mervärdesskattelagen (1994:200)*, the VAT act, that came into force on 1 July, 1994, the special rule on intermediation in one’s own name (Sw., *i eget namn*) of a principal’s goods or services was introduced by Ch. 6 sec. 7. It caused many tax cases and prosecutions within the business world. The problem was in short that an intermediary was deemed by the tax authority (Sw., *Skatteverket*, abbreviated SKV) doing not only the intermediation service, but also the same transaction of goods or services that the principal made due to the effort made by the intermediary, regardless whether a commission agreement existed between them. The basis for classing the intermediary in the same category as a sales person regarding the goods or the services to the consumer was to be found in the preparatory works to *lag (1969:430) om mervärdeskatt* (i.e. the 1969 VAT act), and originated in the third para. first sen. of the instructions to sec. 12 of *Kungl. Maj:ts förordning (1959:507) om allmän varuskatt* (i.e. the 1959 general tax on goods). I have made comments on 6:7 in various contexts. For example are references to the preparatory works in question to be found on page 41 in Forssén 2021b.

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

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

I consider that the alteration consisting of the special intermediation rule 6:7 being adjusted to the VAT Directive breaks the perception existing from time to time by the SKV that an intermediary can be deemed tax liable (nowadays liable of payment) of VAT, only because he

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

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

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

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

It has not been helpful that so-called reverse charge has been introduced against the phenomenon of "VAT carrousels" by the legislator for further situations after this was done for investment gold on 1 January, 2000. Furthermore, legal security has in my opinion been set aside in the context, by the investigations from the SKV and *Ekobrottsmyndigheten* (abbreviated EBM – the Economic Crime Authority) nowadays being initiated in the first place by trading being carried out between Sweden and other Member States of the EU regarding a certain sort of goods, above all electronical products. This takes place instead of questions about the concept *omsättning* [transaction – nowadays *leverans* or *tillhandahållande* (supply)] being subject to a thorough judgment, like in the investigations at the time of my lecture at Swedish Law Meeting in 2001. 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 new rules on the place of supply of services according to directive 2008/8/EC, a seminar was

held on 11 June, 2009 in Stockholm by *Institutet för Mervärdesskatterättslig Forskning* (the Institute for Research on VAT law). I brought up that seminar in 2011 on the pages 222 and 349 in Forssén 2011. On that seminar was also mentioned inter alia that sales of computers do not only concern the goods, but each computer is comprised by an OEM-licence whose supply normally shall be treated in itself for VAT purposes – like a supply of services. The same question should be brought up also for operating systems in mobile phones, instead of the authorities disregarding big international actors in ”VAT carrousels” regarding mobile phones.

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