

Release from falsely charged VAT

Published: 2024-12-13 at 11.57

Dagens Juridik (Today's Law)

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

In a previous debate article in *Dagens Juridik* (Today's Law), "*Felaktigt debiterad moms föranleder betalningsskyldighet – inte skattebrott – 'karusellen' går vidare*" (Falsely charged VAT causes liability of payment – not tax fraud – the 'carrousel' goes on), published 2023-11-27, I brought up the tax fraud question and whether tax fraud can be deemed existing regarding an amount which has been falsely denoted as value-added tax (VAT) on an invoice. Such an amount does not constitute VAT according to the general rules in the VAT act but give rise to liability of payment to *Skatteverket* (the tax authority), abbreviated SKV. Therefore, I denote the amount false VAT.

In this article, I bring up the question on false VAT again, now in connection to my article in *Tidningen Balans fördjupningsbilaga* (The Periodical Balans: Advanced articles) 3/2018 (pp. 3-5), *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), published 2018-06-12 (see www.tidningenbalans.se). There, I submitted certain legal certainty reflections over the so-called mercy errands on release from tax according to Ch. 60 sec. 1 *skatteförfarandelagen* (2011:1244), the Taxation Procedure Act, abbreviated SFL, and the law trial institute, i.e. the possibility to give certain Government decisions a law trial by application to *Högsta förvaltningsdomstolen*, the Supreme Administrative Court, abbreviated 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, according to Ch. 67 sec. 6 second sen. of the SFL, if the SKV rejects the application for release. 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).

I consider that the special institute of release regarding the liability of payment for certain taxes and fees nearest resemble the mercy institute according to Ch. 12 sec. 9 of *regeringsformen* (1974:152), the 1974 Instrument of Government, abbreviated RF. The decision by the SKV in an errand on release according to Ch. 60 sec. 1 of the SFL can, as mentioned, be appealed and then, as also mentioned above, to the Government. If the Government makes a negative decision, the individual should in my opinion 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).

A problem for the individual that I mentioned in the above-mentioned article in *The Periodical Balans* is that the SKV considers that a release from VAT according to Ch. 60 sec. 1 of the SFL only can regard output tax, not input tax where VAT is concerned. Therefore, I deem that there is in principle a "gap" (Sw., "*lucka*") in the field of VAT, where accessible legal remedies are concerned. We do not have a general right of access to courts in Sweden,

which I consider is in conflict with the very principle of access to courts according to article 6 of the European Convention on Human Rights (the European Convention). This could have been resolved along with the reform of the RF in 2010, but it was not done and a direct connection to the European Convention was dismissed, which has been mentioned by Professor Wiweka Warnling-Nerep (nowadays Warnling Conradsson) on pages 31, 42 and 43 of *RÄTTSMEDEL: om- & överprövning av förvaltningsbeslut* (LEGAL REMEDIES: review and trial by appeal of administrative decisions). Jure Förlag AB, Stockholm 2015. I have mentioned the question on page 16 in my e-book *Nya förvaltningslagen och skatteförfarandet – studiematerial: Andra upplagan*, the new Administration Act and the tax procedure – study material: Second edition (self-published 2019, see my website, www.forssen.com, and printed version at Kungliga biblioteket in Stockholm (the National Library of Sweden) and at Lund University Library. Here, I emphasize the principle of access to courts as a support for the HFD admitting an application for a law trial of a release errand according to Ch. 60 sec. 1 of the SFL, whereby I note that sec. 1 of the act on law trial of certain Government decisions is referring to article 6(1) of the European Convention.

In the article in The Periodical Balans, I stated that it is not obvious that the Court of Justice of the EU would consider that the perception meaning that release only can apply to output tax and not to input tax is the only valid one. Therefore, I stated that the question was suitable to be subject of research in a legal certainty respect. Another "gap" that should be brought up by the legislator in the same respect is whether what I call false VAT can be comprised by the concept VAT according to the institute of release according to Ch. 60 sec. 1 of the SFL.

A special liability of payment for falsely charged VAT – false VAT – was introduced on 1 January, 2008 in the then *mervärdesskattelagen (1994:200)*, the VAT act, by SFS 2007:1376. The rule on liability of payment for an amount falsely denoted as value-added tax (VAT), Sw., *mervärdesskatt (moms)*, in an invoice was introduced into Ch. 1 sec. 1 third para and sec. 2 e by virtue of article 203 of the EU's VAT Directive (2006/112/EC). Nowadays, it is to be found in Ch. 16 sec. 23 of the new *mervärdesskattelagen (2023:200)*, the new VAT act, which was introduced on 1 July, 2023 and 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.* Fictitious transactions are examples of cases of liability of payment for false VAT [see prop. 2007/08:25, *Förlängd redovisningsperiod och vissa andra mervärdesskattefrågor* (Extended accounting period and certain other VAT issues), p. 91]. The receiver of an invoice with such a falsely charged VAT can be responsible of tax fraud according to sec. 2 of *skattebrottslagen (1971:69)*, the Tax Fraud Act, 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. I state in the mentioned DJ-article that this follows by the preparatory works to the reform of 2008, where the legislator states the following (in my translation): *To further stress that a falsely charged VAT shall not lead to anything else than a liability of payment for the person who has falsely charged the VAT it is however suggested that the liability of payment for this false amount is stipulated in a separate section, Ch. 1 sec. 2 e of the ML.* See prop. 2007/08:25 page 90.

Sveriges advokatsamfund (the Swedish Bar Association) has on 2024-11-15 submitted to the Treasury its considerations, R-2024/1201 (see www.advokatsamfundet.se), over the report *Åtgärder mot mervärdesskattebedrägerier (SOU 2024:32)*, Measures against VAT frauds (SOU 2024:32), that is the final report of the investigation where 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), is included and a central question concerns precisely to find measures against VAT frauds of so-called carousel type. Therefore, the Bar Association brings up under a special headline in its considerations 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, when it concerns a matter of so-called *missing trader*, i.e. of carousel trading where the fraud quite simply consists of a trader disappearing, which in English 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, but the Bar Association emphasized then that already the predecessor to article 203, i.e. article 21(1)(d) of the EC's Sixth VAT Directive (77/388/EEC), should – as a mandatory directive rule – have been implemented into the VAT act of 1994 at Sweden's accession to the EU in 1995, not first in 2008 as a measure of fighting crime (see prop. 2007/08:25 p. 86). 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 due to SOU 2024:32 is clarified whether falsely charged VAT is comprised by "skatt" (tax) according to the Tax Fraud Act. Concerning the VAT has, in pursuance of the principle of conferred competence, the Swedish Parliament conferred competence to the EU's institutions (organs), but the criminal law is a field where an in principle exclusive national competence applies [see prop. 1994/95:19, *Sveriges medlemskap i Europeiska unionen* (Sweden's membership of the European Union), Part 1 p. 472)].

I consider that the legislator should clarify whether the concept VAT in the institute of release according to Ch. 60 sec. 1 of the SFL comprises what I call false VAT. In the predecessor to the SFL it was stipulated by the so-called rule of equality, Ch. 1 sec. 4 second para no. 3 of *skattebetalningslagen (1997:483)*, the payment act, that amounts according to Ch. 1 sec. 1 third para of *mervärdesskattelagen (1994:200)*, i.e. falsely charged VAT, were equal to "skatt" (tax). In the SFL 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 *mervärdesskattelagen (1994:200)*. This is stipulated also regarding VAT according to Ch. 16 sec. 23 of *mervärdesskattelagen (2023:200)*. 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.

Thus, with respect of the right of access to courts not being general in Sweden, legal certainty reasons should motivate an amendment in Ch. 60 sec. 1 of the SFL so that the institute of release comprise falsely charged VAT. I connect to the mentioned article in The Periodical Balans, where I state that in the preparatory works was mentioned, as an example of extraordinarily reasons for release, a matter of a foreign entrepreneur who is not registered to VAT in Sweden and who has paid VAT on imports here but cannot be reimbursed by his or her Swedish customer due to that person being in bankruptcy (see prop. 1996/97:100, *Ett nytt system för skattebetalningar, m.m.* (A new system for tax payments, etc.), Part 1 p. 596). 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.

Dagens Juridik red@dagensjuridik.se