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

[Translation of the article *Mellanmän och frågor om karusellhandel respektive vinstmarginalbeskattning – en jämförelse av gamla och nya mervärdesskattelagen i Sverige*, by Björn Forssén, published in original in Swedish in Tidskrift utgiven av Juridiska Föreningen i Finland – Eng., The journal published by the Law Society of Finland (abbreviated JFT), JFT 4/2024 pp. 294–329.]

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. They concern matters on assertion of VAT frauds of so-called carrousel type, that is such a carrousel trading that I sometimes call ’VAT carrousels’, and cases 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 these cases concerning whether Swedish VAT law regarding the mentioned theme is complying with the EU’s VAT Directive (2006/112/EC).[1]

I have previously mentioned the intermediary question in the JFT with regard of the Swedish VAT reform on 1 July, 2023 meaning that the VAT act, *mervärdesskattelagen (1994:200)*, abbreviated GML, was replaced by the VAT act, *mervärdesskattelagen (2023:200)*, abbreviated ML.[2] The rule that I am analysing in this article was to be found before the reform in GML Ch. 6 sec. 7 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.[3] 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

[1] EU, abbreviation of the European Union or the Union. The complete title of the EU’s VAT Directive is COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax.

[2] 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 2024a). Forssén 2024a is available on www.forssen.com.

[3] See GML Ch. 1 sec. 2 sixth para, 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 GML Ch. 6 sec. 7.

corresponding rules in the VAT Directive would be considered carried out by a common special rule, GML Ch. 6 sec. 7, 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 GML Ch. 6 sec. 7 and article 14(2)(c) and article 28 of the VAT Directive respectively:

GML Ch. 6 sec. 7 (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 of GML Ch. 6 sec. 7 was altered, so that it nowadays consists of two rules, ML Ch. 5 sec. 3 second para no. 3 and sec. 27, 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:

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

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

ML 5 kap. 27 § (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 GML Ch. 6 sec. 7 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 ML Ch. 5 sec. 3 second para no. 3 and sec. 27.[4] Then, I note that the expression *in his own name*, which

[4] 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*

existed in GML Ch. 6 sec. 7 as well as in the predecessor of the VAT act of 1968, has not been transferred from GML Ch. 6 sec. 7 to ML Ch. 5 sec. 3 second para no. 3, 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* 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 ML Ch. 5 sec. 27. 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 in the tax authority (Sw., *Skatteverket*, abbreviated SKV) and the Economic Crime Authority (Sw., *Ekobrottsmyndigheten*, abbreviated EBM), in for example errands and cases where they stated that VAT frauds of so-called carrousel type (carrousel trading) occurred, asserted 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 GML Ch. 6 sec. 7 and in its predecessor, first para of item 3 of the instructions to sec. 2 of the VAT act of 1968.[5]

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

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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.

[5] See Forssén 2024a, 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').

constitutes the whole sales price to customer. Furthermore, the middleman will in such a case be deemed making an acquisition 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 ML Ch. 20, previously GML Ch. 9 a, the person in question may always choose to *apply the general VAT rules* in the ML, previously the GML.[6] 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 GML Ch. 6 sec. 7 and according to the predecessor, first para of item 3 of the instructions to sec. 2 of the VAT act of 1968 respectively.[7]

- 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.[8]

- 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.[9]

- 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.[10]

[6] See ML Ch. 20 sec. 5.

[7] See section 2.

[8] See section 3.

[9] See section 4.

- 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.[11]

- 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, collector's items, and antiques.[12]

- 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.[13]

- 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.[14]

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[15] 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 GML Ch. 6 sec. 7 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*.

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[10] See section 5.

[11] See section 6.

[12] See section 7.

[13] See section 8.

[14] See section 9.

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

When the VAT replaced the general tax on goods in Sweden on 1 January, 1969, by *lag (1968:430) om mervärdeskatt*, the rule in question was transferred to first para of item 3 of the instructions to sec. 2 of the VAT act of 1968, 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*.[16] The SKV has taken as its starting-point that its predecessor, *Riksskatteverket* (abbreviated RSV), i.e. the National Tax Board, in its handbook considered that commissioner was only an exemplification on application of the special rule.[17] 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*.[18] The fact that the exemplification in question was abolished in GML Ch. 6 sec. 7, 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*.[19] The SKV has also in its handbook expressed that GML Ch. 6 sec. 7 shall apply *for example at sales in commission*.[20]

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 GML Ch. 6 sec. 7, but without mentioning that the legislator stated there that the words *for example* from item 3 of the

[16] See section 1.

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

[18] 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 mervärdesskattelagen* ('VAT carrousels' and the alteration of the special intermediation rule by the new VAT act), *Dagens Juridik* (Today's Law) 2024-05-16 (Forssén 2024b). Forssén 2024b is available on Today's Law's website, www.dagensjuridik.se, and on www.forssen.com.

[19] See prop. 1993/94:99 (*Ny mervärdesskattelag* – New VAT act), s. 190. Jämför även SOU 2002:74 (*Mervärdesskatt i ett EG-rättsligt perspektiv* – VAT in an EU-law perspective) Part 1, p. 653 and Björn Forssén, *Momsrullan IV: En handbok för praktiker och forskare* (The VAT roll IV: A handbook for practicians and researchers), section 11 222 000, self-published 2019 (Forssén 2019a). GML Ch. 6 sec. 7 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. Forssén 2019a is available on www.forssen.com, and is also available in printed version at *Kungliga biblioteket* in Stockholm (the National Library of Sweden) and at Lund University Library.

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

instructions to sec. 2 of the VAT act of 1968 were not transferred to that rule because the exemplification was considered *unnecessary*.[21]

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), was the special rule in question not mentioned. I gave my viewpoints on that report in the JFT,[22] and note in Forssén 2024b, 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 legislator considered that it strengthened the adjustment of the VAT act to the structure and wording of the VAT Directive,[23] why Ch. 5 sec. 3 second para no. 3 and sec. 27, which in principle corresponds with article 14(2)(c) and article 28 of the VAT Directive, were introduced in the ML by the VAT reform of 2023.[24] 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 EC's Sixth VAT Directive (77/388/EEC) as in the VAT Directive, which replaced the Sixth VAT Directive on 1 January, 2007.[25]

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,

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[21] 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.

[22] See Björn Forssén, *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). Forssén 2020a is available on www.forssen.com.

[23] 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).

[24] See section 1.

[25] 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 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 Directive. The complete title of the Sixth VAT Directive was: SIXTH COUNCIL DIRECTIVE of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (77/388/EEC).

2022 made to the Council on Legislation for consideration abandoned the viewpoint in SOU 2020:31 meaning that GML Ch. 6 sec. 7 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 article 28, into the ML Ch. 5 sec. 3 second para no. 3 and sec. 27 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 GML Ch. 6 sec. 7 did.[26] 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 ML Ch. 5. 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 GML Ch. 1 sec. 2 sixth para expanding the concept tax 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 GML Ch. 6.[27] 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 is in conflict with the constitutional principle of legality for taxation measures.[28] 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 is in conflict with the EU law insofar that it is binding for the EU Member States to implement directives into the national legislation, which follows by article 288 third para of the Treaty on the Functioning of the European Union, abbreviated

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[26] 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 ML). Self-published 2019 (Forssén 2019b). Forssén 2019b is available on www.forssen.com, and is also available in printed version at *Kungliga biblioteket* in Stockholm (the National Library of Sweden) and at Lund University Library.

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

[28] 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 *regeringsformen (1974:152)*, the 1974 Instrument of Government, abbreviated RF.

TFEU, and that in the present respect is a matter of 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 *Högsta förvaltningsdomstolen* (formerly *regeringsrätten*), the Supreme Administrative Court (abbreviated HFD), if it was not for the request since 1972 of leave to appeal for such a trial to take place.[29] If a trial in the HFD in a tax case regarding the scope of ML Ch. 5 sec. 3 second para no. 3 and sec. 27 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 '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 shall work against competition distortion depending on the tax according to TFEU article 113 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 ML Ch. 5 sec. 39 first para It only means that the rules in ML Ch. 5 sec. 3 second para no. 3 and sec. 27 *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 GML Ch. 6 sec. 8 first para to GML Ch. 6 sec. 7. Therefore, I mention in this article only GML Ch. 6 sec. 7 and first para of item 3 of the instructions to sec. 2 of the VAT act of 1968 and ML Ch. 5 sec. 3 second para no. 3 and sec. 27 respectively, when I problemize what the adjustment to articles 14(2)(c) and 28 of the VAT Directive means for the – again based on

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[29] *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 FPL sec. 35. 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). *Tidningen Balans Fördjupningsbila*ga (The Periodical Balans Annex with advanced articles) 5/2017, pp. 20–23 (published 2017-11-26 on www.tidningenbalans.se). (Forssén 2017). Forssén 2017 is available also on www.forssen.com. 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 2019c). 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 Court of Justice of the EU (abbreviated CJEU). Forssén 2019c is available on www.forssen.com, and is also available in printed version at *Kungliga biblioteket* in Stockholm (the National Library of Sweden) and at Lund University Library.

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 GML Ch. 6 sec. 7 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*,[30] abbreviated DML.

What is commission trading according to the FML follows by FML sec. 19, 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 them 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 them to the representative.*

Thus, FML sec. 19 has a wording that lies close to GML Ch. 6 sec. 7. However, in my opinion the two rules are not directly corresponding to each other. What distinguish them from each other is in the first place that FML sec. 19 is lacking such a writing concerning whether the middleman receives the payment from the customer which were to be found in GML Ch. 6 sec. 7. 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).[31]

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.

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[30] 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.

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

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 by FML sec. 19 second para.

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 FML sec. 19, whereby the tax authority 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.[32]

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

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

existing with respect of VAT. This confirms my opinion that what is in the first place distinguishing GML Ch. 6 sec. 7 and FML sec. 19 from each other is that it for commission trading is lacking a writing in FML sec. 19 regarding whether the representative is receiving the payment from the customer. By the way, it is expressly stipulated in FML sec. 19 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 GML Ch. 6 sec. 7 or ML Ch. 5 sec. 3 second para no. 3 and sec. 27.

Thus, I consider that the FML is lacking a direct correspondence to GML Ch. 6 sec. 7. 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 ML Ch. 5 sec. 3 second para no. 3 and sec. 27 having replaced GML Ch. 6 sec. 7, 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 receives the payment from the customer *and* omits to, in the invoice to that person, identify the mandator.

Although it, as above-mentioned,[33] 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,

[33] See section 2.

- 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.[34] 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 ML Ch. 9 b – nowadays – ML Ch. 19 – concerning travel agents and profit margin taxation (PMT), where *in his own name* is used concerning travel services. Compare FML sec. 80 first para concerning the determination of travel services and special scheme for travel agents in DML sec. 67 first para. Those rules correspond with the special scheme for travel agents in ML Ch. 19, 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*" 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 these 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.[35] Also in the nowadays applying ML a definition of the concept intermediation is lacking.[36] 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 EC's Sixth VAT Directive (77/388/EEC), 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 so is expressly stipulated in the ML, like regarding bank and financial services, trading of securities and insurance services.[37] For

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

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

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

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

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.[38]

That a middleman in his own name sold goods or services for the mandator meant according to GML Ch. 6 sec. 7 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 GML Ch. 3 sec. 1 first para (nowadays ML Ch. 10 sec. 2), 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.[39]

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 GML Ch. 6 sec. 7 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, 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).[40]

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.[41] However, that does not

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

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

[40] 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.

[41] See section avsnitt 3.

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 GML Ch. 6 sec. 7. 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.[42] 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 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 is in conflict 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”,[43] and that “the common system of VAT shall be applied up to and including the retail trade stage”.[44]

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 2023a, I wrote in the JFT about the Swedish VAT reform in Forssén 2024a. 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 errands and cases on that theme become more matters of legal interpretation, by the question whether a correct

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[42] See Björn Forssén, *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), JFT 4–6/2023, pp. 344–378. (Forssén 2023a). Forssén 2023a is available on www.forssen.com.

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

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

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.[45] Before I am going through this rather complex question in the nearest following section, I give a background to what – besides Forssén 2020b and Forssén 2020c – 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' has a tendency to occur rather arbitrarily in for example errands on 'VAT carrousels' and then especially in cases of composite transactions.

In the introduction of Forssén 2023a, I state that the inspiration to that article came to a certain extent partly from a course I have given with the title *Momsbedrägerier genom karusellhandel* (VAT frauds by carrousel trading),[46] where inter alia an article of mine published in *Svensk Skattetidning* (Swedish Tax Journal) was included,[47] partly from a lecture I gave on the topic at *Svensk Juriststämma* (Swedish Law Meeting) over two decades ago, on 14 November, 2001.[48] I mentioned too that I in Forssén 2023a also set 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.[49]

The inspiration to the present article comes of course also from my mentioned deepening in the topic, and above all from that I before this year's (2024) lectures and seminars that I have

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[45] See Björn Forssén, *Sammansatta transaktioner och semiotik beträffande moms* (Composite transactions and semiotics regarding VAT), *Svensk Skattetidning* (Swedish Tax Journal) 2020 pp. 160–172 (Forssén 2020b) 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 2020c). In 2022 I translated Forssén 2020c into English with the title mentioned. (Forssén 2022a). Forssén 2020b, Forssén 2020c and Forssén 2022a are available on www.forssen.com, and Forssén 2020c and Forssén 2022a are also available in printed versions at *Kungliga biblioteket* in Stockholm (the National Library of Sweden) and at Lund University Library.

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

[47] See Björn Forssén, *Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704* (VAT frauds of so-called carrousel type and NJA 2018 p. 704), *Svensk Skattetidning* (Swedish Tax Journal) 2022 pp. 118–130. (Forssén 2022b). Forssén 2022b är tillgänglig på www.forssen.com.

[48] See Björn Forssén, *Föredrag på Svensk Juriststämma* (Lecture at 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. The lecture memo is available on https://www.forssen.com/forskning/f10/f13/. (Forssén 2001).

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

held every year since 2015 on The Master's programme in European Legal Studies at Södertörn University (Stockholm) am preparing a material for the students. The material will, concerning the item VAT frauds by carrousel trading, inter alia consist of Forssén 2022b, Forssén 2023a, Forssén 2023b, Forssén 2024b and another article that I am mentioning in the present article.[50] I have put together that material and few other om my writings in a book which is laid out on the study web at Södertörn University (contact person is docent Patricia Jonason).[51] I have also been inspired to write the present article due to the Swedish Bar Association in June 2024 appointed as author in a work group that will make a draft of reply with considerations to the Treasury in the mid of November 2024 on the final report from *Utredningen om åtgärder för att förhindra mervärdesskattebedrägerier* (The investigation about measures to prevent VAT frauds).[52]

In Forssén 2023a, 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 *skattebrottslagen (1971:69)*, the tax fraud act, abbreviated SBL. In Forssén 2023a, 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 2023a and Forssén 2024a, and problemize regarding middleman situations especially the question from Forssén 2024b 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 GML Ch. 6 sec. 7, whereby I iterate from Forssén 2024b 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).[53]

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[50] See Björn Forssén, *Aktuell utredning löser inte problemet med momsbedrägerier* (Current official report does not solve the problem with VAT frauds), *Tidningen Balans fördjupning* (The Periodical Balans Annex with advanced articles) 2024 pp. 1–11, published 2024-05-07 on www.tidningenbalans.se. (Forssén 2024c). In Forssén 2024c, 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). Forssén 2024c is available also on www.forssen.com.

[51] See Björn Forssén, *"Momskaruseller" samt näringspenningtvätt, m.m.* ("VAT carrousels" and commercial money laundering, etc.). Self-published 2024 (Forssén 2024d). In 2024 I translated Forssén 2024d into English with the title mentioned. (Forssén 2024e). Forssén 2024d and Forssén 2024e are available on www.forssen.com and also in printed versions at *Kungliga biblioteket* in Stockholm (the National Library of Sweden) and at Lund University Library.

[52] 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. Those interested can take part of the Bar Association's answer on its website (https://www.advokatsamfundet.se/), when it is finished. Then, I will place it also on https://www.forssen.com/forskning/f10/.

[53] See p. 7 in the memo that the participants at my lecture received (i.e. Forssén 2001), and which is available on https://www.forssen.com/forskning/f10/f13/.

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 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 the CJEU's joint cases C-131/13, C-163/13 och C-164/13 (*Schoenimport "Italmoda" Mariano Previti*, ECLI:EU:C:2014:2455) the Advocate General mentioned in the opinion for a judgment (ECLI:EU:C:2014:2217) inter alia that *missing trader* is a case of carrousel trading where the fraud quite simply consists of a trader disappearing, hence the expression *missing trader*. 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" (see items 32–34 of the Advocate General's opinion for a judgment).[54]

The Advocate General is stating in the opinion for a judgment 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 they 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".[55]

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

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[54] See items 32–34 in the Opinion of the Advocate General in the CJEU's joint cases C-131/13, C-163/13 och C-164/13 (*Schoenimport "Italmoda" Mariano Previti*).

[55] See items 31–37 in the Opinion of the Advocate General in the CJEU's joint cases C-131/13, C-163/13 och C-164/13 (*Schoenimport "Italmoda" Mariano Previti*).

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 whose supply normally shall be treated by itself with respect of VAT – like a supply of services.[56] The same applies to operating systems in mobile phones.

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 PAL sec. 2 first para first sen. 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 PAL sec. 1 by the provision that the damage shall be a consequence of security flaw.[57]

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[56] OEM, *Original Equipment Manufacturer*.

[57] 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 2019d).

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.[58] The 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.[59] 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",[60] and in my opinion it should – in 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 TFEU article 107(1). 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 GML Ch. 6 sec. 7, 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 ML Ch. 22 and Ch. 23, and according to ML Ch. 22 sec. 8 first para 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 *skatteförfarandelagen (2011:1244)*,

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Forssén 2019d is available on www.forssen.com, and is also available in printed version at *Kungliga biblioteket* in Stockholm (the National Library of Sweden) and at Lund University Library.

[58] 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.

[59] 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 on 1 November, 2022): see https://www.regeringen.se/faktapromemoria/2022/11/202223fpm7/.

[60] See item 30 of the CJEU's case C-41/04 (*Levob Verzekeringen and OV Bank*), ECLI:EU:C:2005:649, 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".

the Taxation Procedure Act, abbreviated 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 choses 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 ordinary VAT accounting go to the Member State which is the place of the supply of the service.[61]

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 GML Ch. 6 sec. 7 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 profit margin taxation (PMT) regarding such trading were to be found in GML Ch. 9 a, and are nowadays, as mentioned above, to be found in ML Ch. 20 (*Särskild ordning för begagnade varor, konstverk, samlarföremål och antikviteter*), Special scheme for second-hand goods, works of art, collector's items and antiques.[62] 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 GML Ch. 6 sec. 7 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 2024a concerning PMT regarding dealing with second-hand goods, works of art, collector's items and antiques.[63]

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

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[61] 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). *Tidningen Balans fördjupning* (The Periodical Balans Annex with advanced articles) 2023, pp. 1–11 (published 2023-11-16 on www.tidningenbalans.se). (Forssén 2023c). Forssén 2023c is also available on www.forssen.com.

[62] See section 1.

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

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 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 2024a, I stated also that the SKV’s perception of GML Ch. 6 sec. 7 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.[64] 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 GML Ch. 6 sec. 7 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 GML Ch. 6 sec. 7 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 GML Ch. 6 sec. 7 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

[64] 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.

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 GML Ch. 6 sec. 7 and first para of item 3 of the instructions to sec. 2 of the VAT act of 1968 respectively.

That the expression ”*i eget namn*” (in his own name) has not been transferred from GML Ch. 6 sec. 7 to ML Ch. 5 sec. 3 second para no. 3, 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 FML sec. 19 and DML sec. 4 third para no. 1 respectively, it is according to ML Ch. 5 sec. 3 second para no. 3 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,[65] 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.[66] 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 ML Ch. 5 sec. 3 second para no. 3 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 (Forssén 2001).[67] It regarded that authors in civil law do not write anything about VAT.

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[65] See section 4.

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

[67] See Björn Forssén, *Föredrag på Svensk Juriststämma* (Lecture at 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. The lecture memo is available on https://www.forssen.com/forskning/f10/f13/. (Forssén 2001).

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,[68] 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.[69] 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).[70] In the section ”*Handlande i eget namn*” (Acting in 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!*.[71] 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 GML Ch. 6 sec. 2 (and SFL Ch. 5 sec. 2),[72] 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*.[73] Thus, in my

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[68] 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).

[69] See Söderlund 1994, p. 164.

[70] 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).

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

[72] See Björn Forssén, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier* (Tax and payment liability to VAT in joint ventures and shipping partnerships). Örebro Studies in Law 4/2013 (Forssén 2013). Forssén 2013 is available in the data base DiVA (www.diva-portal.org) and on www.forssen.com, under *Böcker m.m.* See also Forssén 2024a, 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 ML Ch. 4 sec. 16 and Ch. 9 sec. 16 respectively, 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.

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

opinion it has not been in compliance with the EU law in the field that the SKV claimed that GML Ch. 6 sec. 7 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 ML Ch. 5 sec. 3 second para no. 3 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 FML sec. 19 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.[74]

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 *Högsta domstolen* (the Supreme Court). 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 GML Ch. 6 sec. 7 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 errands 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 RF Ch. 8 sec. 2 first

[74] See section 3.

para no. 2 and Ch. 1 sec. 1 *brottsbalken (1962:700)*, the Penal Code (abbreviated BrB), respectively.

As far as my experience goes, errands and cases about VAT frauds by carrousel trading at the time of my lecture at Swedish Law Meeting in 2001 – see 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 – existed in the actual errand and case. Nowadays, too many subjects are in my opinion involved in errands and cases on carrousel trading, whereby it is enough that a trader has electronical products in his assortment. This despite what I state above from the Advocate General's opinion for a judgment in the CJEU's joint cases C-131/13, C-163/13 och C-164/13 (*Schoenimport "Italmoda" Mariano Previti*) regarding that although fraudsters often prefer goods like computer components or mobile phones, since they 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 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.[75]

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 errands and cases about such cases without the two administrative authorities fully regarding the principles according to RF Ch. 1 sec. 9 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 an errand 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 begins with, which in my opinion shows that a too general selection of enterprises to investigate is made. I am reminding in that respect of 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 errands 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 can be questioned whether the investigations are fulfilling the constitutional demands on matter-of-factness and impartiality. The fact that the question on which tax assessment bases for VAT a search should be made is set aside too by the SKV makes the investigations on carrousel trading by the SKV and the EBM also being made without regard of 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

[75] See section 6.

the whole sales price, instead of only charging VAT on the profit margin.[76] 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 intra-Union acquisition of goods 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.[77]

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 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 SBL sec. 2 or sec. 4. 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*,[78] 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 SFL Ch. 46 sec. 5, and sues one or more of the partners before the administrative court for personal liability of payment, according to SFL Ch. 59 sec. 16. 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

[76] See section 7.

[77] See Forssén 2024a, pp. 66 and 67.

[78] See section 6.

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 being done the SKV makes reports on suspicion of tax fraud already after having made a suggestion of decision to refuse the company deduction of input tax.[79]

By treating errands 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 Sweden consisting of licences on letting of software like operating systems in electronical products, for example computers and mobile phones.[80] 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 RF Ch. 1 sec. 9.

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 they constitute extraordinary reasons (Sw., *synnerliga skäl*) to try the matter again in the actual tax case, according to FPL sec. 37 b. 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 *rättegångsbalken (1942:740)*, the Code of Judicial Procedure (abbreviated RB). There is no support in the rules on auditing in SFL Ch. 41 for the SKV being allowed to carry out a tax audit in the described tendentious way, but the SKV shall be

[79] See Forssén 2024c, 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.

[80] See section 6.

able to make a decision 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 SFL Ch. 2 sec. 5.[81] 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*.

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 GML Ch. 6 sec. 7 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.[82]

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 ML Ch. 5 sec. 3 second para no. 3 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.[83] 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.[84]

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[81] 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 SFL Ch. 2 sec. 5.

[82] See sections 2 and 3.

[83] See sections 2, 3 and 7.

[84] See section 7.

The alteration by ML Ch. 5 sec. 3 second para no. 3 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 GML Ch. 6 sec. 7 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.[85] 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 for a judgment in the CJEU's joint cases C-131/13, C-163/13 and C-164/13 meaning that the VAT system is fairly complex.[86] 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 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*.[87] 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 European Convention for the Protection of Human Rights and Fundamental Freedoms 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.[88] Thus, the SKV should set the focus on registration control where VAT is concerned, which I stated in Forssén 2013 and iterated in Forssén 2023a, section 8.2, Forssén 2023b, section 5 and Forssén 2024c, section 7 and

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[85] 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 RF Ch. 8 sec. 2 first para no. 2.

[86] See section 6.

[87] See prop. 1995/96:170 (*Översyn av skattebrottslagen*), Overview of the tax fraud act,, p. 91.

[88] 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..

furthermore mentioned in an article in *Dagens Juridik* (Today's Law) in 2021.[89] 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.[90] 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 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 errands 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.[91] 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 ML Ch. 5 sec. 3 second para no. 3 and sec. 27.[92] Based on this conclusion, I consider that if the EBM in an investigation concerning the time before 1 July, 2023 has invoked GML Ch. 6 sec. 7 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 SBL sec. 2 or sec. 4. The question that is given rise to concerning the general courts is thus whether they will be able to handle the

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[89] See Björn Forssén, *Rätt resurs på rätt ställe minskar momsbedrägerierna* (The right resource on the right place decreases the VAT frauds), *Dagens Juridik (Debatt)*, Today's Law (Debate), published 2021-05-05, at 11.07, on www.dagensjuridik.se. (Forssén 2021). Forssén 2021 is also available on www.forssen.com. The four articles, Forssén 2023a, Forssén 2023b, Forssén 2024c and Forssén 2021, are also expressed in Forssén 2024d (Eng., Forssén 2024e), where they 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 2024d (Eng., Forssén 2024e), namely: Forssén 2022b, in chapter I.; and Forssén 2024b, in ANNEX 5.

[90] 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 proposition 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 2021 or Forssén 2024d (Eng., Forssén 2024e), ANNEX 3.

[91] 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.

[92] See sections 2 and 3.

change of current law with respect of VAT in the present respect also regarding the principle of freedom from punishment which is stipulated in BrP sec. 5 second para second sen.