Release from tax – a mercy to peacefully pray for at the SKV's head office and the Government or as a law trial by the HFD

[Translation of the article *Befrielse från skatt – en nåd att stilla bedja om hos Skatteverkets huvudkontor och Regeringen eller rättspröva hos HFD*, by Björn Forssén, published in original in *Tidningen Balans fördjupningsbilaga* (The Periodical Balans: Advanced articles) 3/2018, pp. 3–5. Translation into English by the author of this article, Björn Forssén.]

In this article, Björn Forssén makes legal certainty reflections over the so-called mercy errands on release from tax and the law trial institute. He gives rise to the question how many who is at all aware of the release institute in Ch. 60 sec. 1 skatteförfarandelagen (2011:1244), the Tax Procedure Act (abbreviated SFL) and sets it in relation to law trial, which is a legal remedy meaning that there is a possibility to apply for a law trial of certain Government decisions at Högsta förvaltningsdomstolen, the Supreme Administrative Court (abbreviated HFD). In 1988 an act on law trial was introduced, which in 2006 was replaced by lag (2006:304) om rättsprövning av vissa regeringsbeslut (the act on law trial of certain Government decisions). It is of interest concerning the release errands since a negative decision after application to Skatteverkets huvudkontor (the tax authority's main office) for a release from certain taxes and fees according to Ch. 60 sec. 1 of the SFL can be appealed to the Government.

In 1989/90 Björn Forssén handled in his capacity of Senior Administrative Officer at the National Tax Board (*Riksskatteverket*), today the tax authority's head office (*Skatteverkets huvudkontor*), the so-called mercy errands on value-added tax.

In this article, I make certain legal certainty reflections in particular about value-added tax (VAT) and the release institute of Ch. 60 sec. 1 of the SFL and the law trial institute of *lag (2006:304) om rättsprövning av vissa regeringsbeslut* (the act on law trial of certain Government decisions).[1]

The institute of release presents an opportunity to be granted a release from withholding tax, social fees, value-added tax and excise duties, which follows by Ch. 60 sec. 1 of the SFL, which reads (in my translation):

> *If there are extraordinary reasons, release can be granted by the Government or the authority that the Government determines fully or partly from*
> 1. *the liability of payment according to Ch. 59 sec. 2 for the person who has not made withholding of tax with the correct amount, and*
> 2. *the liability to pay social fees, value-added tax or excise duties*.
>
> *If a decision of release is made according to the first paragraph release may be granted from fee on delay, tax surcharge and interest*.

The institute of release was from the beginning to be found in sec. 76 of *lag (1968:430) om mervärdeskatt*, the VAT act (abbreviated GML). When the GML was replaced on 1 July,

[1] See also section 5.2.8.2 in *Ord och kontext i EU-skatterätten: En analys av svensk moms i ett law and language-perspektiv Andra upplagan* (Words and context in the EU tax law: An analysis of Swedish VAT in a law and language-perspective Second edition), by Björn Forssén. Melker Förlag. Laholm 2017.

1994 by the now current *mervärdesskattelagen (1994:200)*, the VAT act (abbreviated ML), the institute of release was transferred to Ch. 22 sec. 9 of the ML and as the tax account system was introduced on 1 November, 1997 it was transferred to Ch. 13 sec. 1 of *skattebetalningslagen (1997:483)*, the tax payment act (abbreviated SBL). Then, it came to apply to certain taxes and fees besides VAT. By the introduction of the SFL on 1 January, 2012 and replaced inter alia the SBL the institute of release was transferred to Ch. 60 sec. 1 of the SFL. Thus, the supposition for release from tax or fee is according to Ch. 60 sec. 1 of the SFL that extraordinary reasons exist. An application for release shall be submitted to the tax authority *Skatteverket* (SKV – its head office). A negative decision by the SKV can be appealed by the individual to the Government, according to Ch. 67 sec. 6 of the SFL.

VAT and release according to Ch. 60 sec. 1 of the SFL

According to the wording of Ch. 60 sec. 1 of the SFL it *seems* that output tax is meant with value-added tax, since therein is stipulated the possibility of release from liability to *pay* value-added tax etc.[2] With tax liability is regarded, according to what the legislator stated already at the introduction of the ML, only the liability to pay tax to the State.[3]

That the legislator considers that it is the vendor who according to Ch. 60 sec. 1 of the SFL can apply for a release from the obligation to charge and pay output tax on its sales is clearly established by the preparatory works to the nearest predecessor to Ch. 60 sec. 1 of the SFL, i.e. the preparatory works to Ch. 13 sec. 1 of the SBL. There it is stated (in my translation) that with such extraordinary reasons that might cause *release from payment of VAT cannot be considered cases where the tax liable has charged the tax to his or her customers*.[4] A purchaser's application for release from paying input tax is dismissed by the SKV and the Government.

Since the institute of release originates from the GML and thus the time before Sweden became a Member State in 1995, I consider that there is a reason to try the institute of release in relation to the EU law and the EU's VAT Directive (2006/112/EC). The institute of release has been transferred from older Swedish VAT law into an interpretation environment under the EU law. It is not obvious that the Court of Justice of the EU would consider that the Swedish legislator's perception meaning that release only can apply to output tax and not to input tax is the only valid one. In my opinion, the question is suitable to be subject of research in a legal certainty respect.

VAT on imports and release according to Ch. 60 sec. 1 of the SFL contra Ch. 2 sec. 20 of the Customs Act

Of interest concerning the application of the institute of release according to Ch. 60 sec. 1 of the SFL regarding VAT is also a comparison with Ch. 2 sec. 20 *tullagen (2016:253)*, the Customs Act,[5] which reads (in my translation):

> *If there are extraordinary reasons the Government or the authority that the Government determines may grant reduction of or release from other tax than customs*.

[2] See prop. 2010/11:165 Part 2 p. 1012 and SOU 2009:58 Part 3 pp. 1359 and 1360.
[3] See prop. 1993/94:99 p. 105.
[4] See prop. 1996/97:100 Part 1 p. 596.
[5] *Tullagen (2016:253)*, the Customs Act, replaced on 1 may, 2016 *tullagen (2000:1281)*, the Customs Act.

In connection with the introduction of the SFL on 1 January, 2012 the text that existed in Ch. 13 sec. 1 second para of the SFL, meaning that the institute of release also applied to VAT that shall be paid to the Customs at imports of goods (and when excise duties shall be paid to the Customs), got no equivalent. The legislator referred, concerning the reasons to it, to the investigation's report.[6] There it is stated that the SFL shall not be applied on such a tax, since it is instead the Customs Act that shall be applied and it becomes unclear if the SFL and the Customs Act overlaps each other. Therefore, it was suggested that the SFL would not contain any rule on tax – e.g. VAT – that shall be paid to the Customs.[7]

However, since the SFL was introduced in 2012 an order was introduced on 1 January, 2015, by SFS 2014:50 and SFS 2014:52, where VAT on imports is comprised by the procedure according to the SFL and taken out by the SKV for those VAT registered here, whereas the Customs otherwise still is the taxation authority for imports and thus for inter alia VAT on imports in that respect. Thus, in my opinion should an equivalent to the second paragraph of Ch. 13 sec. 1 of the SBL be introduced in Ch. 60 sec. 1 of the SFL so that the institute of release is applicable on such VAT on imports that no longer is comprised by the Customs Act but by the SFL. In that respect, I refer to the Union Customs Code [regulation (EU) no. 952/2013], which since 1 May, 2016 shall be applied together with *tullagen (2016:253)*, the Customs Act, and whereof follows that a customs return shall be submitted to *Tullverket* (the Customs), except in certain cases of exemption, by a person making a customs return established within the Union's customs area.[8]

In the preparatory works to the SBL it was mentioned as an example of extraordinary reasons for release according to Ch. 13 sec. 1 that it would be a matter of a foreign entrepreneur who is not registered himself or herself to VAT in Sweden but who has paid VAT on imports here and thereafter cannot be reimbursed for it by his or her Swedish customer due to that person being in bankruptcy.[9] In my opinion, such a situation should for procedure purposes belong to the SFL and Ch. 60 sec. 1 therein. That such a second paragraph like in Ch. 13 sec. 1 of the SBL has not been incorporated yet in Ch. 60 sec. 1 of the SFL is in my opinion precarious with respect of legal certainty.

Law trial of a Government's decision in a release errand

The HFD is trying applications for law trial and it follows by *lag (2006:304) om rättsprövning av vissa regeringsbeslut* (the act on law trial of certain Government decisions). That act came into force on 1 July, 2006, whereby *lagen (1988:205) om rättsprövning av vissa förvaltningsbeslut* (the act on law trial of certain administrative decisions) was revoked. By that act followed that e.g. law trial could be made if the administrative authority's decision concerned e.g. the principle of legality for taxation measures in Ch. 8 sec. 3 regeringsformen (1974:152), the 1974 Instrument of Government (abbreviated RF) – nowadays Ch. 8 sec. 2 first para no. 2 of the RF – being in conflict with some law rule in a way stated by the applicant and no other possibility for a trial was available, e.g. by the decision stating that it was not possible to make an appeal of it. Nowadays, that possibility is gone on the whole,

[6] See prop. 2010/11:165 Part 2 p. 1012, where that reference is made to "*betänkandet s. 1359 f*" (the report p. 1359 etc.).
[7] See SOU 2009:58 Part 3 p. 1360.
[8] See regarding articles 170(2) and 170(3) of the Union Customs Code: prop. 2015/16:79 p. 113 and SOU 2015:5 p. 105. See also Ch. 1 sec. 2 first para no. 6 and fifth para, its wordings according to SFS 2016:261.
[9] See prop. 1996/97:100 Part 1 p. 596. The described situation for a foreign entrepreneur was also one of a few examples of release from VAT according to section 3 of RSV Im 1982:3.

since the new act introduced on 1 July, 2006 only regards law trial of certain Government decisions. However, in my opinion should the law seeking public nowadays have the opportunity to confer a question whether e.g. a VAT rule is in conflict with the principle of legality to the HFD, by first trying it in pursuance of Ch. 60 sec. 1 of the SFL via the SKV to the Government. By the law remedy law trial the HFD can reject the Government's decision of the question on release.

In the context should from a legal certainty point of view also be considered hidden statistics of cases which would be necessary to law try – most likely – existing due to the demand of leave to appeal in the final court of appeal e.g. in the HFD and preventing a trial of e.g. wrongly written tax rules, by the HFD giving a short 'no leave to appeal' at the appeal of a verdict in someone of the administrative courts of appeal (Sw., *kammarrätterna*).

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